The development of European private law in a multilevel legal order

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Preface

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Esther van Schagen
Groningen, September 2013

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Chapter 1: Introduction

1.1. Introduction

As legal persons have entered into transnational trade, national legislators have become less capable to provide rules to control the conduct of these persons beyond their territory, and national legislators and courts may not be familiar with the needs and preferences of international actors. These developments necessitate the development of transnational rules. Consequently, more actors have become involved in the development of private law in the European Union. Accordingly, the European legislator[1] has increasingly harmonised parts of private law, i.e. the area of material[2] law[3] that stipulates transactions between legal persons.[4]

Thus, the development of private law in the European Union entails the involvement of multiple actors, and increasingly complex processes through which private law is developed. Unfortunately, various problems have become visible: the implementation of the private law *acquis* has led to difficulties,[5] the revision of the private law *acquis* has proven to be a lenghty process[6] and shortcomings in the debate preceding harmonisation at the European level have become visible.[7] Do these problems mean that the involvement of multiple actors is problematic, or can it also be beneficial?

The coexistence of actors in the European Union serves as a starting point for the debate on multilevel governance, further discussed in paragraph 1.2. Paragraph 1.3. will consider the main research question and the sub-questions in more detail. Paragraph 1.4. will outline limitations in this book, and paragraph 1.5. will turn to the methodology.

1.2. Multilevel governance

[1] This book will focus on the coexistence of European and national state and non-state actors involved in the development of European private law. See further on this limitation, par.1.4.
[2] This definition entails that the focus is not on 'procedural' law. See for a definition L. Del Duca, 'Developing global transnational harmonization procedures for the twenty-first centruy: The accelerating pace of common and civil law convergence', 42 *Texas International Law Journal* 2006-2007, p. 658.
[3] "Law" includes both 'hard law', and other rules, referred to as alternative regulation (comp. I. Giesen, 'Alternatieve regelgeving in privaatrechtelijke verhoudingen', in: Alternatieve regelgeving (Handelingen Nederlandse juristen vereniging 2007-I, p. 73: all rules that are not 'normal' rules, i.e. rules that are established by the legislator. In this book, alternative regulation will also include rules developed through delegation). Accordingly, alternative regulation including soft law (norms without legally binding force which may affect parties' behaviour: Comp. L. Senden, *Soft law in European Community law* (diss. Tilburg), Hart: Portland 2004, p. 111-112), co-regulation, which involves both the cooperation between public and private actors in the making of new rules, and the reinforcement of rules negotiated by stakeholders with 'hard law', while these forms cannot be characterised as 'traditional' legislation from the state. Comp. also for a definition of co-regulation Ph. Eijlander, 'Possibilities and constraints in the use of self-regulation and co-regulation in legislative policy: Experiences in the Netherlands – Lessons to be learned for the EU?', *Electric Journal of Comparative Law* 2005, p. 3, available at http://www.ejcl.org/91/art91-1.html, and self-regulation, which can be understood as the making of rules and norms by both by contract parties or a group of persons or bodies binding contract parties or this group, and often, but not necessarily, other private actors that choose to be bound by the rules made through self-regulation.
[4] In this volume, European private law, or private law in the European Union, refers to law that stipulates the rights and duties of parties in transactions developed at the international, European and national level. The book focusses particularly on private law in the Dutch and German legal order, including relevant European law and treaties.
[5] For example, the implementation of Directives may lead to inconsistencies in natonal codifications, see W.H. Roth, 'Transposing "pointillist" EC guidelinesinto national systematic codes – Problems and consequences', *ERPL* 2002, p. 761.
[6] The revision of the *acquis* can be traced to COM (2001) 398 final. More than ten years later, important measures – including Directive 99/44 on consumer sales, Directives 93/13 on unfair contract terms and Directive 90/314 on package travel – still need to be revised. It is not clear if and when these measures will be revised.
[7] W. Doralt, 'Strukturelle Schwäche in der Europäisierung des Privatrechts', *RabelsZ* 2011, p. 260.

In political science, the debate on multilevel governance has emphasised the coexistence of actors, and the interaction and interdependence between actors, as becomes clear from the well-established definition of multilevel governance by Marks:[8]

> 'a system of continuous negotiation among nested governments at several territorial tiers – supranational, national, regional, and local – as the result of a broad process of institutional creation and decisional reallocation that has pulled some previously centralized functions of the state up to the supranational level'

According to this description, the authority of the state has been fragmented: upwards, especially to the European Union, as well as international actors, downwards, to sub-national actors, and sideways, to non-governmental actors.[9] Multilevel governance thus emphasises developments in which the roles of governments across levels change and become more interdependent.

This book focusses on the European legal order, which refers to the competences of and relations between Member States and the Union, as well as international organisations and non-state actors, based on national constitutions, the TFEU and the TEU, treaties, and the law, in particular European private law, established in accordance with these constitutions and Treaties. The European legal order has both been characterised as a confederation, i.e. an organisation based on agreements between states, which however has increasing characteristics of a federation,[10] and as a federation, particularly 'a constitutional order that strives at unity in diversity among previously independent or confederally related component entities', which may have characteristics of a confederation.[11]

The European legal order as a whole can be characterised as a legal order that consists of various levels. Accordingly, an international, European and national layer can be distinguished. Van Gerven and Lierman[12] have held that there is no sharp distinction between these legal orders; they overlap and may conflict with one another, or inspire one another.

According to the discourse on multilevel governance, this multilevel legal order is characterised by interdependence and interaction. The increasing interdependence between actors necessitates interaction between actors.[13] This interdependence and interaction for example becomes visible in the prejudicial procedure, where the CJEU and national courts need to interact with one another to ensure the correct interpretation of the *acquis*. Similarly, the interdependence between state actors and non-state actors[14] also leads to more interaction, as becomes visible in the interaction between non-state actors and the European legislator in the development and review of Directives.[15] The increased role of non-state

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[8] G. Marks, 'Structural policy and multilevel governance in the EC', in: A. Cafruny, G. Rosenthal (eds.), *The state of the European Community Vol. 2: The Maastricht debates and beyond*, Rienner: Boulder 1993, p. 392

[9] L. Hooghe, G. Marks, "Unravelling the central state, but how? Types of multi-level governance", (2003) *Am Polit Sci Rev* 233. This thesis willfocus on the reallocation of competences to the European level and to non-state actors rather than the allocation of competences to sub-national actors, see further paragraph 1.4.

[10] W. van Gerven, S. Lierman, *Algemeen Deel, Veertig jaar later*, Kluwer: Mechelen 2010, p. 49-54.

[11] K. Lenearts, 'Constitutionalism and the many faces of federalism', *Am Journ of Comp Law* 1990, p. 205-206.

[12] W. van Gerven, S. Lierman, *Algemeen Deel, Veertig jaar later*, Kluwer: Mechelen 2010, p. 33-39, similarly, L. Miller, The emergence of EU contract law: Exploring Europeanization, OUP: Oxford 2011, p. 155.

[13] Comp. J. Neyer, 'Discourse and order in the EU: A deliberative approach to multi-level governance', *JCMS* 2003, p. 689, who points to the interdependence between the European institutions as well as the interdependence between Member States seeking to affect European Union policies.

[14] I. Bache, M. V. Flinders, 'Themes and issues in multilevel governance', in: I. Bache, M. V. Flinders (eds), *Multi-level governance*, Oxford: OUP 2004, p. 3.

[15] For example the involvement of the ISDA and its 2000 report on collateral arrangements in the European financial market, available at http://www.isda.org/c_and_a/pdf/NeedLawReform.pdf, in the drafting of Directive 2002/47 on financial collateral arrangements.

actors is also visible in the development of co-regulation and self-regulation at the European level.[16] These developments are sometimes characterised as "governance", in contrast to "government", denoting the development of "hard law".[17] However, this contrast has been criticised[18] and there is wide disagreement on the definition of governance.[19] In this book, "governance" can be defined as 'rules, procedures and behaviour, that affect the way in which powers are exercised'.[20]

The interdependence between state actors from different levels and between state actors and non-state actors in the multilevel legal order has been recognised by the Study Group on Social Justice in European private law:[21]

> 'Law production in the European Union's multi-level system results from the continuous interaction between semi-autonomous actors comprising legislators, the judiciary, and non-governmental organisations, at different levels – European, national, and regional. Law making can neither be monopolised nor achieved in isolation by just one branch of government or a single institution.'

Interdependence becomes visible in the decreased ability of national legislators to safeguard the consistent, predictable and accessible development of European private law, for example through codifications[22] such as the Dutch *Nieuw Burgerlijk Wetboek* (herafter: 'BW') or the German *Bürgerlich Gesetzbuch* (hereafter: 'BGB'), as the private law *acquis* continues to develop. Similarly, European actors do not have sufficient insight in national practices and legal views on justice within Member States, and consequently have to rely on Member States' and non-state actors' insights if they wish to develop private law in accordance with these views and practices. Equally, when actors promote the development of alternative regulation, they should take into account relevant non-state actors and their initiatives.

Thus, interdependence between actors entails high standards for the process through which private law is developed. In particular, sufficient interaction between actors is important. As will become apparent later in this book, interaction may entail many forms of contact between actors, but mere contact will generally not suffice. Instead, the quality of interaction should enable actors to profit from one another's insights. Therefore, this volume will refer to the concept of deliberation.[23] Deliberation is interaction between actors based on arguments trying to reach consensus, and actors participating in debate have to be able to put themselves in the position of other actors.

Deliberation has also been defended for European decision-making. Neyer[24] argues that deliberation is superior to other modes of negotiation when it comes to problem-solving. Although deliberation may not necessarily achieve consensus on future action – i.e. the way

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[16] For example in the involvement of the IASB in the development of international accounting standards under Regulation 1606/2002, see further par. 4.4.1.1.
[17] J. Scott, D. Trubek, 'Mind the gap: Law and new approaches to governance', *ELJ* 2002, p. 1.
[18] Ch. Mollers, 'European governance, meaning and value of a concept', *CMLR* 2006, p. 313.
[19] See on the potential meanings of governance F. Möslein, K. Riesenhuber, 'Contract governance – A draft research agenda', *ERCL* 2009, p. 251, with further references.
[20] Comp. European Commission, *European governance, A white paper*, COM (2001) 428 final.
[21] Study Group on Social Justice in European Private Law, 'Social justice in European contract law: A manifesto', *ELJ* 2004, p. 670. See also on European private law and multilevel governance E.A.G. van Schagen, 'The Draft Common Frame of Reference and multilevel governance', *Edinburgh Student Law Review* 2010.
[22] This book will consider the use of "codifications" in the multilevel legal order, which refers to traditional codifications such as the BW and the BGB. Codifications, in this sense, may appear more prone to problems when multiple actors develop private law, but of course it is also possible to codify the law through revising and replacing various statutes by one statute on a particular part of private law. These codifications may or may not seek to describe the law at a specific point in time, but they may also seek to initiate changes in the law. Codifications in this sense are similarly less capable of providing a consistent and predictable set of rules if the European legislator subsequently introduces harmonization, and the use of blanket clauses in these statutes may similarly be affected. Thus, the questions considered in this book should also be of interest for codifications in this sense.
[23] J. Habermas, *Between facts and norms*,Cambridge: MIT 1996. See further on this concept par. 8.2.
[24] J. Neyer, 'Discourse and order in the EU: A deliberative approach to multi-level governance', *JMCS* 2003, p. 697-698.

in which European private law should be developed – deliberation generally limits the number of options for future action, and also contributes to the quality of those options. These options can subsequently be taken as a starting point in decision-making and facilitate political compromise.

Often, arguments for deliberative discourse presume that democratically drafted legislation should play a central role. Arguably, if legislation is developed through deliberative discourse, this would be, and often is, a lengthy process, but deliberation provides legislative processes with a clearly added value, which, in turn, may prompt a preference for legislation. However, possibly, deliberative discourse could also point to the use of alternative regulation, especially in rapidly developing areas, to which law, if drafted through lengthy deliberative processes, may not adequately respond. Moreover, deliberation may take place in the development of alternative regulation. Accordingly, Neyer[25] and Joerges[26] have defended deliberation especially in comitology.[27]

1.3. The main research question and sub-questions

From the perspective of private lawyers, the coexistence of national and European state actors developing European private law is perhaps the most noticeable difference between the "traditional" nation state[28] and the multilevel legal order. Therefore, the main research question asks to what extent the development of European private law by multiple actors is problematic or beneficial for the quality of European private law.

This question will be answered through the following sub-questions:

i) Which benchmarks can be defended to evaluate the quality of European private law?

Benchmarks of predictability, accessibility, consistency and responsiveness will be defended as private law should facilitate transactions between legal persons.[29] That does not mean private law may not impose restrictions on the freedom of parties to enter into transactions; mandatory law may be in accordance with society's legal views on justice, for example when restrictions are imposed because one party is not capable of sufficiently protecting his interests. Notably, compliance with the benchmarks in this research is not a binary question but rather a matter of degree.

The perspective of private parties will be decisive for determining whether private law meets the benchmarks in this book. "Private parties" is a large, diverse group that consists of parties who are directly or indirectly involved in entering into transactions through private law. [30] This perspective will

[25] J. Neyer, 'Discourse and order in the EU: A deliberative approach to multi-level governance', *JMCS* 2003, p. 690-691.
[26] Ch. Joerges, 'On the legitimacy of Europeanising private law: Considerations on a justice-making law for the EU multi-level system', vol 7.3 *Electronic Journal of Comparative Law* 2003, available at http://www.ejcl.org/ejcl/73/art73-3.html. C. de la Porte, P. Nanz, 'The OMC – a deliberative-democratic mode of governance? The cases of employment and pensions', *JEPP* 2004, p. 270-271 distinguish the argument of Joerges and Neyer for deliberative supranationalism from deliberative democracy defended by Habermas. They argue that Joerges and Neyer focus on comitology, where experts involve in evidence-based deliberative discourse. Notably, deliberative discourse ideally takes place within a limited circle of people with sufficient expertise, as is the case in comitology.
[27] Comitology entails that the European legislator, under articles 290 et seq TFEU, delegates further decisions on technical matters to expert committees, see further par. 4.4.1.1.
[28] This does not refer to a historically correct picture of a particular traditional nation state but rather to an idea that implicitly underpins the development of European private law. See further N. Jansen, Legal pluralism in Europe', in: L. Niglia (ed.), *Pluralism in Europe,* forthcoming, via www.ssrn.com, as well as P. Oestmann, 'Rechtsvielfalt', in: N. Jansen, P. Oestmann (eds.), *Gewohnheit, Gebot, Gesetz*, Mohr Siebeck: Tübingen 2011, p. 99 et seq. This has also been argued for the Dutch legal order, as the Dutch Civil Code dates back from 1809 while the role of contract parties in private law dates from before 1809. Comp. W.J. Zwalve, 'Regelgeving in het vermogensrecht', *RM Themis* 2009, p. 20. See further on the idea of the nation state and the differences between this idea and the multilevel legal order chapter 2.
[29] That does not mean this thesis is limited to contract law. Parties may also enter into transactions when because a tortfeasor is paying damages to a victim. See further on the benchmarks chapter 2.
[30] Private parties are an extensive group, including contracting parties, tortfeasors and their victims, owners, tenants, employers and employees, but also third parties whose rights are affected by other parties' transactions. Private parties realistically include legal practitioners advising and representing them. In addition, private parties may also be represented by stakeholder

be decisive because private law primarily addresses private parties. Private parties need to rely upon private law, and therefore, their interests are directly affected by private law. Moreover, private law traditionally depends upon private parties for enforcement. This characteristic gives private parties and their representatives a prominent role.

The more European private law is in accordance with these benchmarks, the easier it will be for private parties and practitioners to comprehend European private law. Therefore, this book will also allude to the quality of material European private law by referring to the comprehensibility of European private law, which refers to the understanding of European private law by private parties and practitioners.

Before considering what actors are involved in the development of European private law, it is important to sketch differences between nation states and the multilevel legal order, to make clear in what respects the development of European private law differs from the development of private law in nation states.

This sub-question will be addressed in chapter 2, after which chapter 3 will provide an introduction to chapters 4-6 on the next sub-question.

ii) What actors develop European private law in the German and Dutch legal order?

The actors considered in this book can be divided into state actors, including national legislators and courts, as well as the European legislator, the European Commission and the CJEU,[31] international organisations, and non-state actors, including private parties (contract parties and other parties relying on private law), stakeholder groups, and academics.

Moreover, chapter 4 on the German legal order will also provide starting points for a normative framework to determine which actors should be involved in the development of European private law. The principles underlying this framework will also be considered in chapters 5 and 6. Chapter 6 will compare the involvement of actors in the development of private law in respectively the German and Dutch legal order and ask whether the involvement of different actors in the development of European private law affects the quality of European private law.

iii) Have actors, in the development of European private law through national techniques, adequately taken into account that other actors develop private law, which can limit the extent to which these techniques can contribute to benchmarks of predictability, accessibility, consistency and responsiveness, and how has this affected the quality of European private law?

“Techniques” is a broad, collective term for codifications, blanket clauses, soft law, general principles and other means through which private law may be developed.

‘National’ techniques refer to techniques the use of which is modelled on the assumption of the characteristics typical of the nation state.[32] The term does not refer to techniques that are used solely at a national level. National techniques are codifications,[33] soft laws, blanket clauses, and general principles. Accordingly, codifications presuppose a central legislator, and blanket clauses typically require the existence of a hierarchical, well-developed judicial system that consistently

associations. Typically, these stakeholder groups enable private parties to inform themselves of ongoing developments and organise themselves, trying to influence the formation of private law by legislators.

[31] This research will refer to the CJEU, which, before the TFEU was known as the ECJ, for the sake of consistency.

[32] See further below, par. 2.6.1.

[33] In this book, ‘codification’ refers to traditional codifications such as the BW or the BGB, see previously footnote 22.

interprets these blanket clauses, as well as an adequate system of enforcement. Also, general principles may play an important part in the development of coherent national private law, especially if national private law is codified.

Furthermore, soft laws such as the PECL and the DCFR will be considered as national techniques, as they are are typically based on models of national legislation, containing black letter rules and providing extensive rules in the area of private law. Often, these sets of soft law are based on national codes and seek to provide a model for a European code.[34]

This volume focusses on these techniques because they have played and will continue to play a central role in the development of European private law. Because they have been designed to function within nation states, at first sight, they are likely to be most affected by the coexistence of multiple actors who become increasingly dependant on each other and therefore need to interact.[35]

The use of national techniques will be considered in chapter 7.

iv) What techniques could be used in addition to or instead of currently used national techniques?

Notably, actors typically use multiple techniques, simultaneously, as one technique may compensate for the weaknesses of another technique. Accordingly, the use of techniques should not be considered in isolation from one another, especially as actors use techniques alongside one another.

The use of additional or alternative techniques will be considered in chapter 8.

v) Can the extent to which a particular area of law meets benchmarks of predictability, consistency, accessibility and responsiveness be traced to actors' recognition of other actors' initiatives and the interaction between these actors?

If multiple actors have been involved in the development of a particular area of law, this decreases the extent to which a single actor is capable of ensuring that that area of law meets benchmarks of predictability, accessibility, consistency and responsiveness. Thus, interdependence develops. As actors have become increasingly interdependent and need to interact, this may have consequences for the actors that are involved in the development of European priovate law and for the way in which European private law should be developed. Is this apparent from the quality of respectively the German and Dutch law on standard contract terms (hereafter 'STC's)?

Chapter 9 is an introduction to the case studies in chapters 10 and 11. Chapter 12 will ask what more general conclusions can be drawn from the case study that are also more generally of interest for the development of European private law.

Chapter 13 will draw conclusions and answer the main research question: Is the coexistence of actors beneficial or detrimental to the quality of European private law?

1.4. Limitations

The question discussed in this book is very broad, and it has been necessary to establish some limitations.

Firstly, to be able to sketch the role of actors in some detail, this research chooses to focus on two states in particular: Germany and The Netherlands. In subsequent chapters, a comparison between Germany and The Netherlands will take place. In the German legal

[34] See further par. 7.3.1.
[35] See further par. 3.4.

order, a constitutional framework has been developed that also provides indications for the development of private law through legislation or alternative regulation. Possible objections to the development of alternative regulation become visible in this framework, which may provide insight on possible objections to the development of alternative regulation in other Member States. The Dutch legal order provides little insight in similar objections.

Secondly, this overview should be seen in the light of the debate in European private law that portrays state legislatures and judiciary as primary actors in private law. European and national actors are the most active actors that develop binding private law, while the reallocation of legislative competences to the European level is likely to continue. Therefore, the research will focus on the interdependence between European and national actors. This also entails that the book will not pursue an in-depth analysis of the reallocation of competences to sub-national actors, which could also be seen against the background of multilevel governance.

Thirdly, the overview will moreover focus on the role of state actors and the use of techniques by those state actors as these actors and techniques currently still play a primary role in the development of private law, while other forms of private law, particularly alternative regulation, are often developed within the framework established by state actors and their legislation and case law. Yet eventually, non-state actors may gain a more prominent role, especially as matters that legislators have to cope with become more complex and require considerable expertise. Accordingly, this research does not overlook the possible role of non-state actors.

Fourthly, this research will study the development of private law in the Dutch and German legal order, and consider the initiatives from European actors where relevant. The overviews will show that European initiatives are increasingly relevant, but the primary level where private law is developed remains the national level. That does not mean that this might not change – but it is not yet sufficiently likely that the role of European actors, notwithstanding a considerable amount of new initiatives and proposals for harmonisation, will increase to the extent that the European level will become the central level where private law is developed. Essential parts of national private law, for example property law, remain applicable.

1.5. Methodology

This book started out from a traditional, national perspective on private law and it primarily uses the traditional legal research method by researching legislation, case law and legal literature, as well as other relevant documents.

However, political science, specifically the discourse on multilevel governance, adds an important insight to the development of European private law. Multilevel governance stresses the coexistence of actors in the European multilevel legal order and draws attention to the interdependence between actors and the need for interaction, a perspective that has generally not been considered in the debate on European private law.

The answer to the question whether the coexistence of actors in the development of European private law is problematic or beneficial depends on the definition of the “quality” of European private law, as well as the question what interaction is necessary to safeguard the quality of private law. Insights from jurisprudence, or legal theory, proved especially valuable in two respects. Insights from jurisprudence were useful for determining the benchmarks for the quality of European private law that were in accordance with views on benchmarks for European private law by private lawyers. Also, jurisprudence provides insights on the

interaction that is required in decision-making, thereby providing further clarification on the need for interaction between actors in accordance with the discourse on multilevel governance.

This volume also contains comparative legal research. The volume does not directly compare legal rules as such, but instead aims to analyse and compare the roles of actors in the Dutch and German legal order. However, some comparative remarks have been made in chapter 6 and comparative insights have served as interesting alternative or additional perspectives in chapters 2, 10, 11 and 12 as well.

Chapters 10 and 11 also contain an analysis of the German and Dutch law on standard contract terms. This part of the book does not however aim to compare differences and similarities between German and Dutch law, but rather, the way in which these rules have been developed, in particular, the interaction between actors involved in the development of these ruies. For both chapters 4 and 5 and chapters 10 and 11, this volume has made extensive use of European, German and Dutch legislation, case law, parliamentary history, sources of alternative regulation, international materials, and legal literature.

Chapter 2: Benchmarks for European private law

2.1. Introduction

This chapter discusses benchmarks for the quality of European private law. As this research takes the perspective of private parties as a starting point, this chapter asks which benchmarks ensure that private parties may unproblematically rely on private law. Accordingly, this chapter will discuss predictability, accessibility, consistency and responsiveness as benchmarks.

If European private law is predictable, accessible and consistent, as well as in accordance with society's legal views on justice and the needs and preferences of legal practice, it will be easier to comprehend private law. If private law is responsive to society's legal views on justice, it will be more easily understood and accepted by private parties. If private law is aware of the needs of businesses, it might be less complicated to make a translation from the law in the books to legal practice. To the contrary, if European private law is not predictable, consistent or accessible, or if it does not develop in accordance with the needs of legal practice and legal views on justice, parties will have more difficulty relying upon private law as it will be difficult to comprehend private law.

These benchmarks have been widely recognised in national private law, and they have already frequently served implicitly as a starting point for criticism on European private law.[36]

However, the analysis from multilevel governance indicates that the multilevel legal order differs from the traditional nation state. This chapter will ask what these differences mean for the development of European private law in accordance with the benchmarks.

The approach of this chapter will be as follows. Paragraph 2.2. will discuss predictability, accessibility and consistency, and paragraph 2.3. will turn to the responsiveness of private law to society's legal views on justice and to the needs and preferences of legal practice. Paragraph 2.4. will discuss why coherence and legal equality are not considered as separate benchmarks. Paragraph 2.5. will argue that developing European private law in accordance with these requirements becomes more complicated in the multilevel legal order. Paragraph 2.6. will draw conclusions and provide an outlook to the subsequent thesis.

2.2. Benchmarks for good law

This chapter will look at well-known requirements that become apparent when looking at national private law and emphasise the perspective of private parties as a starting point. This research benefits from previous, well-known attempts to determine common benchmarks for law. Bacon [37] already developed "laws of good lawmaking" that coincide with the requirements developed by Fuller:[38]

[36] For example H.-W. Micklitz, N. Reich, 'Der Kommissionsvorschlag vom 8. 10. 2008 für eine Richtlinie über „Rechte der Verbraucher", oder: „der Beginn des Endes einer Ära …"', *EUzW* 2009, p. 279.
[37] F. Bacon, *Treatise on universal justice or the foundations of equity*, by aphorisms, from: The works of Francis Bacon, 1889, Yale, aphorism 8, who held that '[c]ertainty is so essential to law, that the law cannot even be just without it.' See further on the similarities between Bacon and Fuller W.J. Witteveen, 'Laws of lawmaking', in: W.J. Witteveen, W. Van der Burg (eds.) *Rediscovering Fuller*, Amsterdam University Press: Amsterdam 1999, p. 328.
[38] L.L. Fuller, *The morality of law*, Yale University Press: London 1973, 9th ed, p. 33 et seq.

1) The generality of laws
2) The public promulgation of laws
3) Laws should not be developed or applied retroactively if possible
4) The comprehensibility of laws
5) The consistency of laws
6) The enforceability of laws that should not prescribe impossible results
7) The stability of laws
8) Convergence between laws as they are announced and applied

In Fuller's view, rules had to comply with these requirements in order to qualify as "law". Moreover, the parable of King Rex outlines that legislation that does not meet these benchmarks it not likely to affect behaviour.

Other authors, who criticised Fuller, in particular Hart,[39] have not rejected these requirements outright. Bentham,[40] to whom Hart[41] referred, developed conditions that legislation – in particular codifications – had to meet in order to achieve the aims that were pursued. Bentham emphasises that legislation needs to be developed in accordance with utility, but also refers to more generally accepted criteria, such as the public availability of laws and their consistency.

2.3. The comprehensibility of European private law

The quality of European private law has become a subject of debate as national private law that does not meet these requirements may prompt harmonisation or amendment of the law in accordance with regulatory competition, or, if possible, circumvention of these rules through choice of law.

The benchmarks of good lawmaking have been considered in recent discussions on the quality of European private law.[42] Yet this research does not follow these benchmarks for several reasons. Firstly, the focus of this research is not the rule of law, or the legality of legal systems, but the quality of material private law. Secondly, benchmarks of good lawmaking have not been developed for private law, but more generally for law as such. Therefore, characteristics of private law, in particular the important role of private parties in the enforcement of private law, have not been considered as such. This also entails that the benchmarks for good lawmaking do not specifically take the perspective from private parties. Accordingly, some benchmarks of good lawmaking are less relevant for private law. Thus, the enforceability of private law depends on private parties, and this requirement does not stand in the way of vague provisions that leave room for discretion for the judiciary to enforce the law in accordance with the needs of legal practice and legal views on justice. These provisions have moreover evidently not stood in the way of the development of a considerable amount of case law, as becomes visible in both the Dutch and the German legal order. Thirdly, the definition of European private law in this research is broader than the

[39] See further on this argument J. Waldon, 'Positivism and legality: Hart's equivocal response to Fuller', *New York University Law Review* 2008, p. 1135.
[40] J. Bentham, *Principles of the Civil Code*, in: J. Bowring (ed.), The Works of Jeremy Bentham, vol. 1 (Principles of Morals and Legislation, Fragment on Government, Civil Code, Penal Law), Chapter XIVV, available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php?person=172&Itemid=99999999.
[41] H.L.A. Hart, 'Positivism and the separation of law and morals', *Harvard Law Review* 1958, p. 594 et seq.
[42] Comp. recently M. Safjan, *Why a European Law Institute?*, Speech held at the ELI Founding Congress, Paris 1 June 2011, text available at http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/_17__Marek_Safjan.pdf, comp. also S. Worthington, 'The unique charm of the common law', *ERPL* 2011, p. 348, who finds that '[a] legal system is regarded as just only if its rules are reasonable, general, equal, predictable, and certain.'

understanding of law that becomes apparent from Fuller. Whereas the benchmarks and allegory from Fuller focus on legislation, this research also includes rules other than legislation, developed through self-regulation and co-regulation. Moreover, Fuller[43] has developed benchmarks for a good system of law, not for the quality of a particular area of material law.

Which benchmarks enable private parties to enter into transactions with one another, in accordance with the general[44] aims of private law?[45] For private parties, the importance of legal certainty has often been emphasised and this benchmark accordingly plays a central role in debate on the quality of European private law. Benchmarks of good lawmaking largely coincide with legal certainty that requires that private law is:

i) Predictable

In turn, this benchmark entails that private law is not retroactively developed (in accordance with requirement 3), as well as the stability of of laws (requirement 7). In addition, for private law, the reliability of private law and the clear woridng of the law will be discussed.

ii) Accessible

In turn, this benchmark requires that private law is publicly promulgated (requirement 1). The accessibility of private law is specifically concerned with parties' ability to identify relevant sources of law, which may be particularly complicated if it concerns unwritten law or unpublished binding alternative regulation. In particular, accessibility of private law requires that parties – or rather their lawyers – can understand laws (requirement 4) which is essential for the enforcement of private law. This further entails the convergence between the wording and the application of the law (requirement 8) that is also important for the predictability of law.

iii) Consistent

This benchmark is in accordance with the consistency of laws (requirement 5). Also, the generality of laws (requirement 1) diminishes the chance that laws develop in isolation from one another, which in turn decreases the chance that inconsistencies develop.

Thus, the requirements of legal certainty may roughly be divided in benchmarks of predictability, accessibility and consistency. These benchmarks may well overlap, and they may also influence and be influenced by benchmarks of responsiveness discussed in paragraph 2.4.

The subsequent paragraphs wll discuss requirements important for legal certainty. Paragraph 2.3.1. will discuss predictability, paragraph 2.3.2 will turn to accessibility and paragraph 2.3.3. will consider consistency. Paragraph 2.3.4. will consider the overlaps between these benchmarks.

[43] L.L. Fuller, *The morality of law*, New Haven: Yale University Press 1969, revised edition, p. 43.
[44] This does not mean that by facilitating private parties' transactions with one another, other, more specific aims may not also be pursued.
[45] Comp. W.J. Witteveen, 'Laws of lawmaking', in: W.J. Witteveen, W. van der Burg (eds.), *Rediscovering Fuller*, Amsterdam University Press: Amsterdam 1999, p. 321: 'Practices of lawmaking are infused with social expectations about what "good" laws are supposed to be and to achieve.'

2.3.1. Predictability

Predictability requires that parties can use private law as guidance in determining their own behaviour and avoiding conflicts, which entails that European private law needs to meet requirements of (1) clarity, (2) reliability, and (3) stable development.

Firstly, private law should preferably contain key concepts and rules with a clear, predictable meaning. In trade, it is important to be able to assess one's risks and act upon that assessment; private law is important for this assessment as it allows parties to assess, for example, what duties arise out of a contract, or whether an exclusion clause is valid. This idea is recognised, for example, in the DCFR, where Von Bar[46] notes that the predictable outcome of a case in some areas is more important than the substance of the rules under which the case is determined. Dutch law,[47] German law,[48] and English law[49] and have similarly recognised the need for clarity. Hondius[50] has pointed out that in several states, clarity can be a constitutional requirement of law. At a European level, the ECHR[51] has held that article 6 ECHR means that citizens must be able 'to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.

This does not mean that rules have to be very precise[52] – a blanket clause in statutory law may also contribute to the predictability of private law, depending on its interpretation. Using ambiguous terms and blanket clauses may also be a way to leave adequate room to allow for legal changes, in order to be able to also provide foreseeable and clear solutions to new developments.[53]

Secondly, predictability entails that if parties have justifiably relied on the statement of behaviour of another party, and acted upon their reliance, in accordance with the law, their reliance should not be disappointed.[54] Predictability may therefore mean giving an enforceable claim to the person who justifiably relied on someone's behaviour; for example, if a party has relied on an offer and his reliance was reasonable, this may entail that an offer is held to be irrevocable, under article 2:202 PECL.

Thirdly, predictability requires that private law is developed and applied predictably, which includes that parties should also be able to enforce their claims. Thus, the development of private law should be logical and predictable. Arbitrarily amending private law decreases the predictable development of private law,[55] as well as continuously amending private law. Also, changes should not take effect retroactively, as this may make it

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[46] Von Bar et al (eds), *Principles, Defi nitions and Model Rules of European Private Law. Draft Common Frame of Reference* Outline Edition 2009, p. 83.
[47] For example L.D. Pels Rijcken, ' Rechtszekerheid, Assepoester vanrechtsvindingstheorieén', in: P. Abas et al (eds.), *Non sine causa*, Tjeenk Willink: Zwolle 1979, p. 310.
[48] H. Wiedemann, 'Rechtssicherheit – ein absoluter Wert?' in: G. Paulus, U. Diederichsen, C.-W. Canaris (eds.), *Festschrift für Karl Larenz zum 70. Geburtstag*, Beck: München 1973, p. 199-215. Comp. for Belgian law Wintgens, 'Zeker weten? Enkele rechtsfilosofische en rechtstheoretische opmerkingen over rechtszekerheid', *RW* 1993-1994, p. 1077.
[49] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591, 638, more generally Lord Bingham of Cornhill, 'The rule of law', Sir David Williams Lecture, Cambridge 2006, p. 6.
[50] E.H. Hondius, *Sense and nonsense in the law. Towards clarity and plain meaning*, Lecture Utrecht. 2007, p.19.
[51] ECHR 26 April 1979 (Sunday Times v United Kingdom), application number 6538/74, par. 49.
[52] See for example J.de Mot, G. de Geest, 'De toekomst van het Europees privaatrecht na het Groenboek', *NJB* 2002/18, pleading for an extremely detailed European Civil Code.
[53] R. Zimmerman, 'Codification: History and present significance of an idea', *ERPL* 1995, p. 114, refers to W. Lorenz, 'On the "calling" of our time for civil legislation', in: A. Harmathy, A. Nemeth (eds.), *Questions of civil law codification*, Budapest: Hungarian Academy of Sciences 1990, p. 128, who states: 'The reason why in Countries with old Civil Codes the courts are still able to find their way lies in the fact that legislators did not attempt too much.' Similarly P.S. Atiyah, 'Common law and statute law', *MLR* 1985, p. 5.
[54] Von Bar et al (eds), *Principles, Defi nitions and Model Rules of European Private Law. Draft Common Frame of Reference* Outline Edition 2009, p. 73. For Dutch law, see prominently J.B.M. Vranken, 'Vertrouwen en rechtszekerheid in het overeenkomstenrecht', in: *Vertrouwensbeginsel en rechtszekerheid in Nederland*, Deventer: Tjeenk Willink 1997, par. 3.
[55] Comp. for example J.M. Smits, 'European private law: A plea for a spontaneous legal order', in: D.M. Curtin et al (eds.), *European integration and law*, Intersentia: Antwerp 2006, par. 6.

considerably more difficult for parties to assess their future legal position to determine their actions.[56]

2.3.2. Accessibility

Accessibility requires that parties have sufficient access to private law, in order to determine their legal position. This entails, in particular, access to sources that impose binding rules on these parties.[57]

The accessibility of sources of private law does not only mean that they should be publicly accessible. If sources are publicly accessible, parties may still face severe difficulties in determining their legal position by looking up publicly accessible legislation or case law.

Firstly, even if sources are publicly accessible, determining one's legal position also requires that one knows which sources are relevant for determining that position. This was already recognised by Bentham,[58] who emphasised the "cognosibility" of private law in a codification. Codifications significantly enhance the access to private law by providing private parties with one source of private law in which private law is systematically ordered, especially compared to private law that can be deduced various coexisting statutes, case law, and self-regulation, or unwritten law. Van Caenegem,[59] who also refers to "cognoscibility", points out that this does not mean that private law cannot be accessible if it is not codified. It is very well possible to simultaneously support the accessibility of private law and reject codification; for example, the accessibility of private law may be increased by overviews and handbooks. [60]

Secondly, even if parties manage to discover the relevant sources, they will still be confronted with specialised legal terms. Accordingly, it has been suggested that 'plain language' should be used in the drafting of legislation.[61] It is submitted that efforts to make provisions in, for example, Civil Codes, more intelligible for private parties themselves may not necessarily lead to clearer or more predictable private law; even if, for example, very simple rules are formulated, these 'simple' rules will subsequently also have to be applied to complex cases.[62] Furthermore, plain language in legislation should not be used when that would lead to inconsistencies with, for example, case law, and the use of plain language can also be compromised by the need for political compromise. At the European level, the use of 'plain language' is made more difficult by the need to cope with different languages and the arguments against using a concept that at first sight may have a clear meaning, but that already have meaning in national private laws.[63] Moreover, when arguing that legislation should be comprehensible to laymen, it should be noted that the layman may not necessarily always read legislation relevant for assessing his legal position – possibly, he may instead

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[56] Comp. CJEU 22 January 1997 (Opel Austria GmbH v Council of the European Union), T-115/94, [1997] ECR, p. II-39, par. 124.
[57] Comp. ECHR 26 April 1979 (Sunday Times v United Kingdom), application number 6538/74, par. 49.
[58] J. Bentham, *Principles of the Civil Code*, Chapter XIVV, available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php?person=172&Itemid=99999999.
[59] R. van Caenegem, *Judges, legislators, and professors*, CUP: Cambridge 1987, p. 161.
[60] Comp. Lord Goff, 'The search for principle', *Maccabean lecture on Jurisprudence, Proceedings of the British Academy* 1984, p. 174.
[61] In The Netherlands, this has for example led to the project in which the Dutch Constitution is 'translated' in plain language: L. van Almelo (ed.), *Onze Grondwet: de rechtsstaat en de grondrechten verklaard voor nieuwe Nederlandse burgers*, VNG: The Hague 2003. See for the English plain language movement http://www.languageandlaw.org/PLAINENGLISH.HTM.
[62] Comp. for the Dutch debate J.B.M. Vranken, 'Niets in het recht is blijvend, behalve verandering', *WPNR* 6560 (2004), note 17.
[63] See G. Danneman, S. Ferreri, M. Graziadei, 'Language and terminology', in: Ch. Twigg-Flessner (ed.), *Cambridge companion to European Union private law*, 2010, p. 70.

rely on advice by lawyers, or free advice from organisations providing free legal advice.[64] Therefore, 'plain language' should not be a criterion for assessing the accessibility of private law.

2.3.3. Consistency

Inconsistency is problematic because it is irreconcilable with the rational character of the law: how can the law logically decide that behaviour is both lawful as well as giving rise to damages for tort? As law establishes order and gives commands, it cannot be contradictory: orders that contradict each other cancel each other out, and law that contradicts itself does not create order but the opposite. Accordingly, consistency has been widely recognised as a benchmark throughout the Union: in English law,[65] as well as in Dutch law[66] and German law.[67] At the European level, consistency is similarly recognised.[68]

Consistency requires that rules do not contradict one another. Yet that does not mean that provisions may not provide rules for different situations, and these rules may, at first sight, contradict one another. Inconsistencies become problematic once parties are obliged to comply with conflicting, contradictory rules, which undermine legal certainty. Thus, inconsistency becomes problematic if it leads to contrdictory rules that are simultaneously applicable.

Inconsistency can arise if legislation contains provisions that contradict themselves, but alternative regulation, which may similarly impose duties on private parties, may also contradict itself. Notably, alternative regulation is not developed by one legislator but by multiple actors which do not necessarily have similar aims, which increases the chance that provisions in multiple sets of alternative regulation that are simultaneously applicable may not be in accordance with one another. However, the scope of alternative regulation is smaller than legislation and the binding effect of alternative regulation is limited to particular sectors or to parties who have subjected themselves to rules developed through alternative regulation, and collective labour agreements, standard contract terms, or model contracts will not be very successful if they impose conflicting duties on parties or contradict themselves.

The development of the private law *acquis* and the incorrect implementation of the *acquis* may also give rise to inconsistencies. Yet if private parties rely on implemented provisions, while not challenging the implementation of a particular Directive, the question arises whether inconsistency between a Directive and national implementation law is problematic. Moreover, Directives themselves are typically not directly applicable between parties, which leads to the conclusion that inconsistencies between a Directive and national law are not inconsistencies between simultaneously applicable rules. However, this inconsistency may be problematic for another reason: incorrect implementation law may be more likely to be amended or reformed, especially if Member States are held liable by the CJEU, which reduces the reliability of incorrectly implemented rules.

[64] Such as, for example, in The Netherlands, the *Consuwijzer*, at http://www.consuwijzer.nl/, or in England Community Legal Advice, see http://www.legalservices.gov.uk/public/community_legal_advice.asp.
[65] N. MacCormick, *Rhetoric and the rule of law*, OUP: Oxford 2005, p. 2: 'Law is institutional normative order.'
[66] Asser/Scholten, Algemeen deel,. Tjeenk Willink: Zwolle 1974, nr. 12, p. 45.
[67] K. Larenz, *Methodenlehre der Rechtswissenschaft*, Springer: Berlin 1991, 6th ed., p. 450.
[68] Comp. COM (2003) 68 final.

2.3.4. Overlaps between predictability, accessibility and consistency

Thus, predictability, consistency and accessibility can be established as benchmarks for European private law. Moreover, predictability, accessibility and consistency show significant overlap, and consequently, complying with one requirement may facilitate compliance with another requirement. For example, increasing consistency may well improve predictability, and improving predictability may well improve the accessibility of private law. Similarly, a clear overview of relevant sources may well increase parties' ability to adequately determine their legal position. Also, accessibility of private law may in turn facilitate understanding private law, which enables more rational debate on the development of private law, and a stable development of private law.

In contrast, if private law is not in accordance with one requirement, this also negatively affects the other requirements. For example, inconsistencies in private law also seriously undermine the predictability and accessibility of private law. Likewise, inaccessibility makes it more difficult for parties to adequately determine their legal position, and retroactive or continuous amendments will undermine the accessibility of private law.

2.4. Responsiveness

Whilst legal certainty is important for private parties, more benchmarks should be set for private law. Parties require more of private law than predictability, accessibility, and consistency. Private law should not develop in isolation from its surroundings. Rather, private law should be responsive. In this respect, two requirements are essential for responsive private law: private parties should perceive the law as just and as effective.[69]

Notably, private law does not merely provide neutral rules, although that may happen; law provides normative rules, especially through mandatory law. Accordingly, if private parties make an agreement that enables them to exploit a third party, or if parties agree on something distinctly immoral, private law should not facilitate these endeavours. Consequently, these normative rules are imposed on private parties and should therefore be in accordance with ideas of justice, which has been recognised more generally.[70]

For example, if the legislature establishes that murderers can inherit the property of their victims, because this exception is in accordance with the principle of *ne bis in idem*, society may consider this unacceptable, for example because murderers are "rewarded" with the property of their victims. This rule could be avoided in several ways. Firstly, the people will try to prompt the legislator to reconsider the exception. Secondly, people could change their wills, providing, insofar as that is permitted by national law, that whomsoever murders them shall not inherit their property. If that clause would not be permitted by the law, it is not unthinkable that testators would try to avoid having to apply that particular piece of law, for example by a choice of law, or in whatever other way they could. Thirdly, the scope of the rule could be limited by the judiciary. Fourthly, if individual cases in which murders are allowed to inherit lead to public outrage, this could moreover re-prompt the legislator to amend the law.

Moreover, private parties, in particular businesses entering into contracts with one another, also want private law to take into account these practices. Everyday practice develops

[69] Justice in itself is problematic as a benchmark, see further below par. 2.4.1. It will be assumed that effectiveness will be increased if private law meets requirements of legal certainty and takes into account the needs of legal practice, as it facilitates private parties who enter int transactions with one another, see further par. 2.3.2. However, the focus of this research is on the perspective of private parties, which also means that the research will not consider whether private law effectively pursues other policy aims.

[70] See further par. 2.3.1.

continuously, and private law should be able to cope with existing and developing practices.[71] If private parties establish a new business, or start using a new technology, or construct their business in a new manner, it is important that private law allows parties to determine their legal position, even if the law was not designed with the new practice or the technology in mind. If private law is not in accordance with legal practice, this may also inhibit parties' ability to rely on private law. Arguably, if private law is easily outdated, it is likely to become obsolete. Outdated law may also hinder private parties in entering into agreements and increase parties' ability to circumvent national law. If private law cannot adequately accommodate the transactions that they have entered into, this may also complicate rather than facilitate entering into transactions.

Thus, private parties do not want private law to develop in isolation; rather, private law should be responsive to ideas on justice and the needs of parties entering into transactions with another.

Nonet and Selznick[72] distinguish responsive law from authoritarian or repressive law[73] and autonomous law.[74] Nonet and Selznick[75] define 'responsive law' as law that has 'a capacity for responsible, and hence discriminate and selective, adaptation'. Without following all of society's views on justice, responsive law perceives 'social pressures' as sources of knowledge and opportunities for 'self-correction'. Thus, a theory for legal change is developed that recognises societal pressures as an external factor that may affect change,[76] emphasising participation and purpose in changing the law. Witteveen[77] notes that the idea of responsive law is likely in accordance with Fuller's ideas on the inner morality of law, as it emphasises the development of the law in accordance with ethical principles closely interrelated with the development of rules, rather than focussing on the origin of rules. More generally, Fuller, in developing his criteria, recognises that law is developed in a social context, and his criteria are in accordance with the idea that if law is to be complied with, interaction between the legislator and the citizens on what the law is to achieve is necessary. Interaction of this sort is more generally important if private law is to facilitate transactions between private parties. Arguably, the idea of responsive law is in accordance with the idea that the question whether private law is of good quality also depends what it expected of private law, which in turn is closely interrelated with normative ideas on justice as well as practical requirements. The need for interaction is particularly important in pluralistic legal orders and accordingly pays attention to the need for developing private law involving different views.[78] Similarly, the importance of developing private laws in accordance with society's views on justice[79] and developing private law in accordance with the needs and preferences of legal practices[80] has been emphasised.

Accordingly, paragraph 2.4.1. will consider the responsiveness of private law to society's legal views on justice, and paragraph 2.4.2. will discuss the responsiveness of private law to practice. Paragraph 2.4.3. will discuss the connection between responsiveness

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[71] See further par. 2.3.2.
[72] P. Nonet, P. Selznick, *Law & society in transition,* p. 16, 17-18, 29, 53.
[73] See J. Austin, *The providence of jurisprudence determined*, Murray: London 1861, p. 15-25.
[74] Comp. M. Rheinstein (ed.), *Max Weber on law in economy and society*, OUP: London 1969, 3rd print, p. 336, on domination based on 'rational rules'.
[75] P. Nonet, P. Selznick, *Law & society in transition: Toward responsive law*, New Brunswick: Transaction Publishers 2001, p. 77.
[76] Comp. also P**.** Selznick, *Law, society, and industrial justice*, 1969, p. 33, tracing development ion strict liability law to technical developments, and emphasising "principles of legality" if law is developed by 'special-purpose organisations'.
[77] W.J. Witteveen, 'Laws of lawmaking', in: W.J. Witteveen, W.J. van den Burg (ed.), *Rediscovering Fuller*, p. 343.
[78] Comp. R.A. Kagan, 'On "responsive law"', in: R.A. Kagan, M. Krygier. K. Winston (eds.), *Legality and community*, 2002, p. 86.
[79] Comp. also Montesquieu, *Over de geest van de wetten,* Boom: Amsterdam 2006 (translation J. Holierhoek), book 29, chapter 16.
[80] Comp. N. Jansen, *The Making of Legal Authority* (Oxford, OUP, 2010), 28; cf. p. 43: the "abstract authority of a text giving expression to a legal norm consists in the legal profession accepting it as an ultimate source of the law".

to society's legal views on justice and legal practice, and the overlap with requirements facilitating legal certainty.

2.4.1. Private law should be responsive to society's views on justice

The relationship between private law and normative views in society has been characterised as continuously interactive: on the one hand, views on just and appropriate behaviour continuously develop in society, and eventually find their way into private law. On the other hand, private law provides a framework for transactions between private parties and affects society's views.[81] Accordingly, private law refers to views held in society, for example article 3:12, article 6:162 Dutch Civil Code, par. 151 BGB or, in the case of the current UK Supreme Court, to the views of commuters in the Underground.[82]

By referring to views in society, private law imports that society's ideas on what is just. These views concern basic ideas about justice, such as compliance with human rights and the rule of law, as well as more controversial political points of view, such as allowing surrogate motherhood. Arguably, the support of those ideas by a democratic majority does not ensure, in itself, that private law is just, only that it is in accordance with views held in society. Unfortunately, such views can be unjust.[83] In other words, the responsiveness of private law does not ensure that private law itself is just, nor is it just because it converges with societal views and developments.[84] Accordingly, in the Dutch Civil Code, the legislator did not want blanket clauses such as article 3:12 Dutch Civil Code to be interpreted too subjectively; this article refers not to 'opinion' but '*legal* opinion' ('*rechtsovertuiging*')[85] which is not determined by democratic majority.[86] Typically, the influence of majority's views on what is just is mitigated as national constitutions and treaties may also reflect society's views on what is just and appropriate. Private law cannot go against these laws, and therefore private law should not be able to facilitate manifest injustice. Consequently, judges are not obliged to undertake a survey of the actual views on a matter held in parts of society. Rather, the judge must determine whether society will tolerate his interpretation of that view or whether it will reject that view as manifestly unjust.

Thus, while responsiveness of private law in itself does not ensure that private law is 'just', responsiveness does ensure that private law takes into account the legal views of the people bound by it, which is just.

Of what ideas may society's views may consist of, and where can these ideas be found? Firstly, the constitutional ideas of a legal order, such as respect for human rights, can be seen as society's legal views on justice.[87] Secondly, arguably, ideas on justice relevant for private law can not only be found in national constitutions, but also in treaties, or other areas of law, such as administrative law. Thirdly, it is submitted that general principles as

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[81] See on the interaction between Dutch private law and society P. Memelink, *De verkeersopvatting*, p. 24-27. Comp. for German law MunchKomm zum BGB/Busche (2012), article 157, nr 16 et seq.

[82] See for example *McFarlane v Tayside Health Board* [2000] AC 82-83 *per* Lord Steyn. O.A. Haazen, 'Precedent in The Netherlands', in: E.H. Hondius (ed.), *Precedent and the law*, Bruylant: Brussels 2007, p. 250 argues that the case law of the Hoge Raad also shows that the Hoge Raad looks to the 'popular support' of a rule when deciding to overrule or conform to previous case law. Comp. on German law A. Röthel, *Normkonkretisierung im Privatrecht*, 2004, p. 28-29 on '*werstausfüllungsbedurftigen Begriffen*, or '*Wertbegriffen*'.

[83] M.W. Hesselink, *De redelijkheid en billijkheid in het Europese privaatrecht* (diss. Utrecht), 1999, p. 32, points to the use of blanket clauses by the Nazi regime.

[84] J.H. Nieuwenhuis, *Confrontatie & compromis*, Kluwer: Deventer 2007, 7-10.

[85] J.H. Nieuwenhuis, *Confrontatie & compromis*, Kluwer: Deventer 2007, 57-58.

[86] Comp. the opinion of A.G. Kist before HR 17 November 1970, *NJ* 1971, 373: 'Dit betekent dat het bij de beoordeling van de aanstotelijkheid [van de eerbaarheid] niet zozeer aankomt op de opvattingen van de zuiver numerieke meerderheid van de bevolking'. Comp. for German law K. Larenz, *Methodenlehre der Rechtswissenschaft*, Springer: Berlin 1991, 6th ed., p. 291-292.

[87] Comp. S. Grundmann (ed.) *Constitutional values in private law*, Kluwer Law International: Alphen aan den Rijn 2008.

recognised by Dworkin,[88] such as the idea that nobody may profit from his own wrongdoing,[89] but also more general ideas on party autonomy and freedom of contract, also constitute ideas on justice as recognised in private law.[90] Fourthly, ideas on justice can be found in unwritten law. In Dutch law, liability for tort can also be established if an act is contrary to society's views ('*verkeersopvatting*') in accordance with unwritten law, as stipulated in article 6:162 par. 3 BW. Similarly, in German law, article 346 HGB recognises customary law as a source of law that affect the interpretation of contracts.[91] Fifthly, those views may also be found in political discourse. Accordingly, views on distributive justice can be seen as underlying choices made in private law.[92] The ideas found in these sources may well overlap – for example, the principle of legal equality can both be guaranteed in national constitutions and be recognised as a principle in private law.[93]

Do ideas on justice converge between the Member States, and consequently, do common ideas on justice underpin European private law?[94] At an abstract level, the ideas on justice may well converge – consider, for example, respect for human rights or principles such as freedom of contract. Yet abstract ideas on justice may well be considered differently when choices between the different ideas become necessary. Dworkin[95] convincingly argued that general principles, such as '*pacta sunt servanda*', or 'legal equality' do not by themselves decide the outcome in a specific case, and a choice for a solution that is in accordance with principle A rather than principle B does not mean that principle B is not a recognised principle underpinning private law anymore. Rather, general principles may give weight to a particular argument. In the absence of a hierarchy of principles or a permanent choice between principles, legal opinion on how individual cases should be decided may well differ.

For example, in wrongful birth cases, the *Hoge Raad* indicated that damages for wrongful birth included the costs of raising the child, and could also include compensation for loss of income of the mother.[96] In contrast, the House of Lords in *MacFarlane v Tayside Health Board*[97] decided that the mother should be compensated for 'general damages' that included the 'pain and suffering' of pregnancy and birth, while the claim for compensation of the costs of upbringing was rejected. Lord Steyn stated that it would not be in accordance with generally held views that parents should be able to claim compensation for the upbringing of a healthy child, considering the amount of couples not able to have children or caring for disabled children, and the possibility that parents would have to argue in court that the unwanted child 'is more trouble than it is worth'. Accordingly, the House of Lords held that awarding pure economic loss in this case would not be 'fair, just, and reasonable'.

[88] R. Dworkin, Taking rights seriously,1977, p. 40: 'the origin of (…) legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time.'
[89] Lord Wright, 'Precedents', *Cambridge Law Journal* 1944, p. 133, considers this a matter of public policy.
[90] Comp. on possible new ideas on justice in Dutch private law the special issue of the *WPNR* on justice in private law on justice in private law ('*Rechtvaardigheid in het privaatrecht*'), *WPNR* 6843 (2010).
[91] Comp. MunchKomm zum HGB/Schmidt (2009), article 346, nr 7.
[92] A. Kronman, 'Contract law and distributive justice', *Yale Law Journal* 1980, p. 472 .
[93] Comp. C.-W. Canaris, *Systemdenken und Systembegriff in Jurisprudenz*, Berlin: Dunckert und Humboldt 1983, 2nd ed., p. 16-17 who has pointed out that the systematic unity introduced by Civil Codes is based on legal equality as legal equality requires consistency and coherence
[94] As defended by G. Alpa, 'European Community resolutions and the codification of "private law"', *ERPL* 2000, p. 328.
[95] R. Dworkin, *Taking rights seriously*, Harvard University press, 1978, p. 35-36.Comp. for German law .J. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, Mohr Siebeck: Tübingen 1956, repinted 1990, p. 221-223, who, referring to the stable development of German private law before and after the adoption of the BGB, finds that principles enable the judiciary to decide more transparently, while also taking into account previous decisions and the wording of the law. In this view, principles are not only derived from the system of the BGB, and their use is necessary, but recourse to legal principles may also present a problem of legitimacy, see J. Köndgen, 'Josef Esser – Methodologie zwischen Theorie und Praxis', *JZ* 2001, p. 808.
[96] HR 21 February 1997, *NJ* 1999, 145, par. 3.7 and 3.13.
[97] *McFarlance v Tayside health Board* [2000] 2 AC 59, 81-83, *per* Lord Steyn.

These different outcomes do not mean that one of the solutions is unjust. In other words, the outcome of one case cannot serve as a requirement that should be applied in the other case, as that would overlook the necessity of responsiveness to the different views on justice in the different societies. Instead, this research asks whether a particular solution is responsive, focussing on the reasoning used to decide especially controversial cases.

2.4.2. Private law should be responsive to practice

If parties enter into transaction with one another, private law should be adequately aware of everyday practice in which parties do so and accordingly accomodate practice. Thus, the practicality ('*hanteerbaarheid*') of private law has been emphasised for Dutch private law.[98] Traditionally, the need for pragmatic private law has been widely recognised. Especially in English law, pragmatism has been emphasised.[99] Although references to pragmatic law are primarily visible in English law that should not be taken to mean that Dutch[100] or German[101] law does not seek to pragmatically respond to business practices.

If private law is to provide an efficient framework for private parties, it should take an adequate starting point and not close its eyes to existing business practices or technological developments. Consequently, if private law is responsive, this will contribute to the efficiency of private law.[102] Notably, if the private law *acquis* is to *effectively* enhance the internal market, it arguably needs to adequately assess existing and developing practices in order to correctly identify problems and barriers to the internal market. It follows that the need for responsiveness to legal practice has increased as private law has been used as an instrument to further policy aims at a European level and in some cases also at a national level. This need is apparently also recognised by the European legislator.[103]

2.4.3. Relations between responsiveness and legal certainty

This paragraph will consider the connection between the responsiveness of private law to society's legal views on justice and legal practice, and secondly consider possible conflicts between the requirements that European private law is responsive and requirements that facilitate legal certainty.

Firstly, the connection between responsiveness to society's legal views on justice has been sketched especially clearly by the Dutch Professor Nieuwenhuis,[104] who sketches how the responsiveness to the requirements of legal practice ('*realia*') and the responsiveness to ideas on justice ('*idealia*') both influence private law and in turn are influenced by private law; there is interaction between the demands of legal practice, ideas on justice and private law.

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[98] A.J. Verheij, ' Wie is verantwoordelijk voor hanteerbaar privaatrecht?', in A.L.M. Keirse et al. (eds.), *Beter Burgerlijk Recht*, Kluwer: Deventer 2012, p. 179, with further references.
[99] See for example P.S. Atiyah, 'Pragmatism and theory in English law', *Hamlyn Lectures* 1987, Lord Goff, 'The search for principle', *Maccabean Lectures on Jurisprudence, Proceedings of the British Academy* 1984, p. 186: 'Pragmatism must be the watchword.'
[100] Particularly prominently in Dutch law P. Scholten, *Algemeen Deel*, Kluwer: Deventer 1974, p. 98.
[101] H.A. Engelhard, 'Zu den Aufgaben einer Kommission für die Überarbeitung des Schuldrechts', *NJW* 1984, p. 1202.
[102] A.D.M. Forte, 'If it ain't broke, don't fix it: On not codifying commercial law', in: H.L. MacQueen (ed.), *Scots law into the 21st century*, Sweet & Maxwell: Edinburgh 1996, p. 93-94.
[103] See for example European commission, Communication from the Commission to the Council and the European Parliament on European contract law, COM (2001) 398 final, stating: 'The European Commission is interested (…) in gathering information on the need for farther-reaching EC action in the area of contract law'(par. 10) or 'The Commission would like to find out if the co-existence of national contract laws in the Member states directly or indirectly obstructs to the functioning of the internal market.' [sic] (par. 23).
[104] J.H. Nieuwenhuis, *Drie beginselen van contractenrecht* (PhD thesis Leiden), Kluwer: Deventer 1977, p. 41-42, see also in this sense H. Collins, 'European private law and the cultural identity of states', *ERPL* 1995, p. 362.

Firstly, rules may be accepted in private law because practice demands that acceptance. Secondly, ideas on justice are not neutral; they prescribe certain behaviour and people should strive to fulfil these ideas. If ideas on justice grow prominent enough, this can be reflected by adopting rules of private law prescribing that behaviour in general, or it can for example be reflected in the interpretation of blanket clauses. As Nieuwenhuis rightly points out, there is interaction between on the one hand the demands of legal practice and on the other hand ideas on justice. If ideas on justice are unattainable, this will lessen their chance of acceptance in private law, and conversely, if demands of legal practice lead to injustice, they will not be accepted.

The requirements of responsiveness and legal certainty may in some cases not be easily reconciled. The possible conflict between complying with requirements facilitating responsiveness to society's legal views on justice – or, more abstractly, justice – and legal certainty has been widely debated. In particular Radbruch[105] has argued that requirements of legal certainty may contradict principles of justice. This is especially the case where the law prescribes injustice in a predictable, consistent and accessible manner.[106]

In other cases, the need for responsiveness and the need for legal certainty may also clash. Responsiveness to legal practice may undermine legal certainty if it means that law develops too rapidly. Actors seeking to develop European private law in accordance with requirements of predictability, accessibility and consistency will generally exercise restraint when adapting, introducing or revoking parts of private law, rather than opportunistically or randomly. Accordingly, Nonet and Selznick[107] find that in order to avoid opportunistic change, law must have a specific purpose. Theoretically, the aim of the private law *acquis* – to improve the internal market and to protect consumers – should inhibit the unstable development of the private law *acquis*.[108] Alternatively, although national private laws may not pursue a specific objective, the coherence of private law also imposes some restraint on actors developing the law. The ideas underlying private law may serve as starting points for amending the law.[109]

Thirdly, complying with requirements of responsiveness to society's legal views on justice and requirements of predictability may also overlap. Even Radbruch,[110] pointing to the possible conflict between legal certainty and justice, simultaneously recognised that legal certainty and justice can also not be seen separately from one another. Arguably, requirements of predictability, accessibility and consistency are also in accordance with the idea of justice: if private law is binding on private parties, private law should comply with requirements that facilitate legal certainty. It is unfair to hold a private party liable for failure to comply with one of multiple contradictory rules, as he cannot comply with both rules, or to expect parties to comply with rules that they cannot have been aware of, because these rules have gone into effect retroactively or were not publicly accessible. Also, the convergence between private law and views in society plays an important role in the ability of private parties to know what the law is, without possessing specific expertise on private law. Lack of clarity, inconsistencies, and inaccessibility affect some parties more than others: when bringing a successful claim becomes more difficult, especially actors with little expertise and financial resources may be discouraged from bringing a claim. In this way,

[105] G. Radbruch, *Rechtsphilosophie, Gestamtausgabe Band 2* (ed. and rev. A. Kaufmann), Heidelberg: Müller 1993, p. 169.
[106] See in more detail G. Radbruch, 'Statutory lawlessness and supra-statutory law (1946)', *OJLS* 2006, p. 1.
[107] P. Nonet, P. Selznick, *Law & society in transition: Toward responsive law*, New Brunswick: Transaction Publishers 2001, p. 77.
[108] Comp. for example the criticism in H. Eidenmüller et al, 'Towards a revision of the consumer-*acquis*', *CMLRev* 2011, p. 1077.
[109] Comp. P.S. Atiyah*, Pragmatism and theory in English law*, Hamlyn Lectures 1987, p. 101-103 on the disadvantages of amending the law without a sound theoretical basis.
[110] G. Radbruch, *Rechtsphilosophie*, p. 170.

weak parties protected by the legislator can be denied their protection, which will generally be considered unfair.

Also, responsiveness may require that private law is predictable. Chalmers[111] already indicated that the common law has developed predictably, because English commercial practice expressed the need for predictability. In Dutch law, some authors have even understood legal certainty and practicality as synomnyms.[112]

[111] M.D. Chalmers, 'Codification of mercantile law', *LQR* 1903, p. 14.
[112] For example H. Drion, ' Het rechtszekerheidargument', in: H. Drion et al., (eds.), *De hanteerbaarheid van het recht*, Tjeenk Willink: Zwolle 1981, p. 1-13. The Hoge Raad has mentioned these benchmarks separately, see relatively recently HR 8 July 2011, *NJ* 2011, 309.

2.5. Benchmarks of justice, coherence and legal equality

Should justice, coherence and legality equality also be benchmarks to evaluate the quality of European private law? Paragraph 2.5.1. will consider justice, and paragraph 2.5.2. will discuss coherence. Subsequently, paragraph 2.5.3. will turn to legal equality.

2.5.1. Justice

The criticism of Hart[113] on the "inner morality" defended by Fuller indicates that Fuller's requirements overlook an essential benchmark of law. Hart found that referring to the "inner morality of law" was confusing, and argued that similar requirements could also, for example, justify the "inner morality" of poisoning. In other words, the development of private law in accordance with Fuller's criteria does not necessarily mean that the law is also moral.[114]

It has been debated whether private law at a European level should be just - the drafters of the DCFR have indicated that "justice" is one of the fundamental principles underlying European private law and go on to discuss principles of private law, as 'aspects' of justice.[115] However, simultaneously, in developing the private law *acquis*, the Commission is bound to the competences conferred upon it and has therefore sought to develop the private law *acquis* as a means to advance the internal market, rather than advancing justice.

According to the definition of "just" in the Oxford English dictionary, law is well-founded, upright and impartial, or in accordance with principles of fairness. These definitions arguably do not exclude one another. This argument indicates that the development of a "just" private law entails the development of material law that is morally right. These definitions indicate views on justice are *normative* views on both the content of the law and the outcome of individual cases in accordance with the law. Moreover, these are not individual views; as Dworkin[116] points out, they are views shared by the community – which perhaps is a reason why there is disagreement on the question whether the rules in the private law *acquis* should be the result of considerations on justice, given the different views between Member States. As the law purports to say something about wrong and right, its views are subjected to the question whether this view of the law on wrong and right is correct.

It has been defended that private law is especially concerned with questions of corrective justice, rather than distributive justice.[117] Private law, in this view, is concerned with corrective justice as it protects the status quo and provides remedies for breaches of that status, such as tort, for breach of the status quo (good X belongs to Y). However, as the distinction between public and private law becomes less clear, the distinction between private law as a means for corrective justice also become less convincing. Thus, in European private law, according to arguments for 'social justice', private law should compensate for unequal positions between parties and provide protection to weak parties such as consumers.[118] Thus, questions whether private law is "just" do not only concern corrective justice but also distibutive justice.

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[113] H.L.A. Hart, 'Book review', *Harvard Law Review* 1964-1965, p. 1286. Comp. also H.L.A. Hart, *The concept of law*, 1961, p. 157: 'Indeed, there is no absurdity in conceding that unjust law forbidding the access of coloured persons to the parks has been justly administered, in that only persons genuinely guilty of breaking the law were punished for it and then only after a fair trial.'

[114] B. Bix, *Jurisprudence : Theory and context*, Caronlina Academic Press: Durham 2006, 4th ed., p. 103 notes that justice is a 'subset' of morality.

[115] Comp. the outline edition of the DCFR, p. 84.

[116] R. Dworkin, *Law's empire*, Harvard University Press: Cambridge (Mass.) 1986, 211.

[117] Ariistotle, *Nichomean Ethics*, through http://classics.mit.edu/Aristotle/nicomachaen.html, Book V, 6.

[118] Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto', *ELJ* 2004, p. 653.

Nevertheless, "justice" as a benchmark is problematic for two reasons. Firstly, it is difficult to determine in which cases private law is in accordance with justice. Of course one can hardly argue that the content of law, including private law, should be just, but the question: "what is justice?" is not so easily answered. Are there absolute requirements of "justice" and if so, how can we know them? And how would an "absolute" requirement be applied in specific cases? Arguably, justice, or a just solution in a particular case, also depends upon the circumstances specific to that case, and the meaning of "justice" becomes clear in those specific situations.[119] Alternatively, the view of what is just may also vary with the perspective that one takes: justice from the perspective of consumers, businesses, international organisations, philosophers? Views on what is "just" may already differ within states; in the European Union, these views are divided even more. Is it then possible to formulate requirements of justice with which the contents of private law have to comply, which could be imposed on private laws? It seems not really in accordance with the idea of, for example, democracy, to impose such absolute requirements on private laws. In contrast, if justice does not provide an "absolute" requirement, how can it serve as an "objective" requirement?

Secondly, "justice" is not considered as a separate benchmark in this research as the idea that private law should be just is already expressed in the idea that private law should be in accordance with society's legal views on justice. This benchmark also avoids the difficulties involved in specifying what justice requires in individual cases, while recognising that private law cannot isolate itself from legal views on what is just. Thus, the idea of responsive law offers a convincing alternative to "justice" as a benchmark.

2.5.2. Coherence

If private law is coherent, it can be derived from general ideas on justice, and these underlying ideas and principles 'allow one to make sense of the law'.[120] It follows that coherence goes beyond consistency that merely requires that the law does not contradict itself. Specifically, if private law consists of a collection of detailed provisions that do not contradict one another, it is consistent. Yet if private law is consistent but incoherent, it is not clear why a statute or regulation contains this collection of provisions and not others.

Improving coherence need not necessarily mean codification or placing all of (an area) of private law in a rigid system, although the assumption that private law should be coherent lies at the basis of efforts for systematisation. Instead, coherence may be improved in many ways and in many degrees. For example, actors may make private law more coherent by reforming the law, but coherence may also be improved by establishing academic overviews of (areas of) private law.

The coherent development of law depends on the sufficient relation between areas of law.[121] The question whether there is sufficient relation between areas of law depends on one's perspective; thus, actors taking a functional approach to the development of law may find areas of public law and private law should be developed coherently, whereas state actors emphasise the coherent development of (areas of) private law.

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[119] Comp. C.J.H. Brunner, *De normen van het privaatrecht*, Kluwer: Deventer 1996, p. 8.

[120] N. MacCormick, *Rhetoric and the rule of law*, OUP: Oxford 2005, p. 201, p. 190. In the introduction to the 2009 outline edition of the Draft Common Frame of Reference, par. 11, "fundamental" principles are equated with "basically abstract values", which may provide a basis for private law and its further development. However, these values (freedom, security, justice and efficiency) differ from the principles of justice that underpin the law that Dworkin refers to, for example "no one should profit from his own wrong".

[121] Comp. W. van Gerven, S. Lierman, *Algemeen deel. Veertig jaar later*, Kluwer: Deventer 2010, p. 190. Comp. also C.-W. Canaris, *Systemdenken und Systembegriff in Jurisprudenz*, Berlin: Dunckert und Humboldt 1983, 2nd ed., p. 13.

Coherence is not a *factual* characteristic of private law. According to Soriano,[122] '[t]he legal system is made up of precedents and legislative acts which share neither a single author, nor the same socio-political (and moral) context. Moreover, its values and principles are in a state of continuous tension.'

Coherence is interrelated with ideas of justice and equality. Canaris[123] finds that the idea of justice – in particular legal equality – requires generalisation to the point that specific rules can be seen as specifications from general ideas on justice. This view is not specific to the German legal order. For Dutch private law, Scholten[124] has similarly held that coherence, for private law, can be considered as the internal systemic unity of private law in which rules of private law are tuned in to one another, as they can be deduced from a limited number of general principles, while the development of new law can also be based on those general principles.

However, coherence cannot serve as a separate benchmark for the following reasons. Firstly, the development of coherent private law already follows from benchmarks of responsiveness and accessibility. Developing European private law in accordance with society's legal views on justice implies the development of coherent private law. If private law consists of an arbitrary collection of rules, it is hard to imagine how that would respond to societal views on justice. **[125]** If private law should take into account those views, how can it be arbitrary? Views on justice may change over time, and they may not be absolute, but as private law takes these views into account, it ceases to be arbitrary and starts to make sense – there are reasons underlying choices made in private law. Also, frequently, actors developing private law coherently do so because they find this is in accordance with developing private law in accordance with requirements of accessibility. as coherence will allow one to make sense of private law by providing insight in ideas of justice, in the form of principles that underpin private law,[126] which will increase the accessibility of private law.[127]

It may be concluded that coherence is not a separate requirement, although actors may pursue the coherent development of law in order to ensure the stable development of private law. Actors who find that coherence is a separate requirement will agree with these efforts, and even see it as a necessity. Accordingly, this research recognises that techniques that emphasise the coherent development of private law, in particular codification, are a well-established and widely recognised manner of developing the law in accordance with requirements of accessibility, predictability, consistency and responsiveness and may effectively contribute to those requirements.

2.5.3. Legal equality

Legal equality firstly requires that private law is developed in such a way that equal cases be decided equally, and secondly prohibits discrimination.[128]

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[122] L. Moral Soriano, 'A modest notion of coherence in legal reasoning. A model for the European Court of Justice', *Ratio Juris* 2003, p. 302.
[123] C.-W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz*, Duncker & Humblot: Berlin 1983, p. 12, p. 16-17.
[124] P. Scholten, *Algemeen Deel*, Kluwer: Deventer 1974, p. 45.
[125] Comp. also the definition of the Study Group on Social Justice in European Private Law, 'Social justice in European contract law: A manifesto', *ELJ* 2004, p. 656: 'any system of contract law expresses a set of values, which strives to be coherent, and which is regarded as fundamental to the political morality of each country.'
[126] N. MacCormick, *Rhetoric and the rule of law*, OUP: Oxford 2005, p. 201, p. 190.
[127] Comp. R. Zimmerman, 'Codification: History and present significance of an idea', *ERPL* 1995, p. 110 who finds that the coherence of private law, reflected by the systematic unity of private law in a codification, enables private parties, or rather their representatives, to consider the normative context in which their case can be seen, to avoid inconsistencies and to reach solutions that fit in with solutions for other problems.
[128] Comp. D. Schiek, 'Freedom of contract and a non-discrimination principle – Irreconcilable antonyms?', in: T. Loene, P.R. Rodrigues (eds.), *Non-discrimination law: Comparative perspectives*, KLI: The Hague 1999, p. 86.

Legal equality is an important principle that reflects a basic notion of justice. It has however also been considered as a controversial principle, as it raises the question in which respects parties are equal. Thus, if parties are equal, they should be treated equally, but if that is not the case, parties should not be treated equally. Aristotle [129] particularly distinguished between these views on equality:

> 'it is thought that justice is equality, and so it is, though not for everybody but only for those who are equals; and it is thought that inequality is just, for so indeed it is, though not for everybody, but for those who are unequal'

Therefore, equality does not mean that private law should provide the same rules for all private parties. Rather, equality demands that private law provides rules that adequately distinguish between private parties. However, the grounds of distinction between private parties, and the consequences for distinctions in private law, may vary throughout the Union. Legal equality has affected the development of private law in two respects.

Firstly, Canaris[130] has pointed out that the systematic unity introduced by Civil Codes is based on legal equality as legal equality requires consistency and coherence. This idea has also been recognised in the Dutch legal order.[131] In the English legal order, the isolated development of specialised fields of private law has similarly been held to frustrate legal equality.[132] More generally, the principle of *stare decisis* emphasises the importance of deciding cases equally. Legal equality has similarly been recognised at the European level, and hamronised law especially seeks to promote equality between parties from different legal orders.

Secondly, the prohibition on discrimination has increasingly invaded private law, which has become particularly apparent as provisions in Civil Codes, for example 7:646 Dutch Civil Code, directly emphasise equal treatment. Notably, article 7: 646 Civil Code is an implementation of Directive 2000/78, which considers in its preamble[133] that the European Union is founded upon respect for human rights and the rule of law. Additionally, predictability, accessibility and consistency can be severely undermined if rules are applied differently for groups of people on the basis of characteristics often falling within the sphere of human rights.

However, legal equality should not serve as a separate requirement. Firstly, legal equality already follows from developing European private law in accordance with society's legal views on justice. This becomes particularly apparent when considering article 7:646 BW. This provision does not establish a new norm, but it specifies the requirements of legal equality in labour contracts and gives private parties a direct claim when an employer makes a distinction that violates article 7:646 BW.[134] Thus, women who, for example, enjoy less fringe benefits than their male colleagues, can base their claim on this specific article and do not have to base their claim on blanket clauses or unwritten law.[135] The increasing referral to legal equality, as legislators develop rules compensating for unequal bargaining positions, may similarly be sought in changing views on what groups are equal to one another and the

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[129] Aristotle, *Politics*, Book 3, section 1280a, available at http://www.perseus.tufts.edu.
[130] C.-W. Canaris, *Systemdenken und Systembegriff in Jurisprudenz*, Berlin: Dunckert und Humboldt 1983, 2nd ed., p. 16-17,also H.A. Engelhard, 'Zu den Aufgaben einer Kommission für die Überarbeitung des Schuldrechts, *NJW* 1984**,** p. 1203,
[131] A.R. Bloembergen, 'De eenheid van het recht', in: *Bloembergens werk*, Kluwer: Deventer 1992, p. 559.
[132] [1981] AC 675, 701. See similarly P. Birks, The need for the Institutes in England, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 1991, p. 711.
[133] Consideration 1, 4, 11-12, preamble to Directive 2000/78.
[134] J.M. Smits, 'Constitutionalisering van het vermogensrecht', in: *Preadviezen uitgebracht door de Nederlandse Vereniging van Rechtsvergelijking* 2003, par. 7, 23.
[135] Comp. for the Dutch legal order HR 8 April 1994, *NJ* 1994, 704, par. 3.5.

insight that the inequality between parties in some cases necessitates unequal treatment.[136] This tendency could also be defended on the basis of fairness: as private law addresses private parties as equal, they should be treated equally, and as groups of people, for example consumers, employees or tenants, are found to be in a weaker position than contract parties that are on an equal footing with their contract party, they should not be treated equally.

Secondly, legal equality is as such also an unsuitable benchmark as it is too abstract to enable determining whether private parties are treated equally as European private law is developed. This becomes clear when asking in what cases equal treatment would be established. Considering the infinite amount of differences between individual cases, absolute equality would be difficult to achieve - and moreover, the law tends to differentiate between groups of people (such as businesses and consumers) that should be considered equal. Also, determining whether private parties are treated equally may well be a politically sensitive issue – for example, the question whether the equal treatment of same-sex couples and heterosexual couples requires that states enable same-sex couples to marry is a political one, and the views of Member States differ widely on this and other questions. Even within Member States, these questions may be controversial, and there are different views on whether and how legal equality affects private law, and different approaches are visible in Member States.[137] The lack of agreement on this topic among states, as well as ongoing societal, ethic, and scientific developments have led the European Court of Human Rights to consider that states have a wide margin of appreciation on this topic.[138] From this perspective, different treatment need not necessarily be unequal treatment. Consequently, imposing one's views on legal orders that do or do not recognise same-sex marriage may entail that private law is no longer developed in accordance with society's legal views on justice, which is clearly undesirable.

For these reasons, the research will not use legal equality as a separate requirement; however, evidently, private law should be in conformity with constitutional requirements, including legal equality, and actors developing private law in accordance with society's legal views on justice should comply with legal equality, as a generally accepted legal principle of private law.

[136] H. Collins, 'Transaction costs and subsidiarity in European contract law', in: S. Grundmann, J. Stuyck (eds.), An academic Green paper on European contract law, 2002, p. 269-282. For the German legal order see recently D. Looschelders, 'Diskriminierung und Schutz vor Diskriminierung im Privatrecht', *JZ* 2012, p. 105.
[137] See for a comparison C. Mak, *Fundamental rights in European contract law*, Kluwer Law International: Alphen aan den Rijn 2008.
[138] ECHR 20 March 1997 (X, Y, and Z v United Kingdom), appl. no. 21830/93, *NJ* 1998, 235, par. 44.

2.6. Developing private law in a national or multilevel legal order

Contrary to Fuller's example of King Rex, the development of European private law takes place in a multilevel legal order. Rather than one king, subjects as well as multiple "kings" simultaneously develop European private law. What does this mean for developing European private law in accordance with requirements facilitating legal certainty and responsiveness?

Paragraph 2.6.1. will consider the development of private law in a "traditional" national legal order. Paragraph 2.6.2. will discuss how the increasing role of non-state actors complicates the development of European private law, and paragraph 2.6.3. will analyse how the coexistence of both state actors and non-state actors at different levels affects the development of European private law.

2.6.1. Developing private law in the nation state

One legislator has a central, clearly delineated competence to initiate legislation, either in the form of a codification or in the form of statutes. These statutes or codes are promulgated publicly, in the official language(s), so that the people can become aware of them. The legislature, or part of the legislature, is democratically elected, and if the legislator passes legislation that is unsatisfactory, either because it undermines legal certainty or responsiveness, this may become an issue in future elections. In this manner, the legislature can be pressured in developing private law in accordance with legal certainty and society's needs and preferences. Legislation is preceded by debate in which stakeholders, academics, and legal practitioners can participate. Typically, the discussion of representative actors ensures that individuals are adequately represented in democratic debate, even if they do not participate. This discussion is based on rational arguments between actors that recognise the validity of one anothers' arguments, in accordance with the ideal of deliberation.[139]

Legislation is subsequently interpreted further by a hierarchically organised judiciary. If the constitution permits, the judiciary may set aside legislation to protect constitutionally recognised rights. The court highest in the hierarchy safeguards the uniform interpretation of the law. Even if its decisions are not binding, the task of that highest court and principles of legal equality generally ensure that lower courts follow the decisions of the highest court. In addition, the legislator, the courts, or academics will have developed rules for the consistent use of interpretation methods used by the judiciary. Which methods are prominent may also depend on the relation between the legislator and the judiciary; if the legislator has a particularly prominent role, judiciaries may pay more attention to legislative history, while judiciaries in other legal orders may adopt more restraint towards the intentions of the legislator and instead take the text of legislation as starting point. However, this does not mean that judiciaries will only select one method of interpretation, and methods of interpretation also depend on other circumstances. The decisions of the judiciary can subsequently be enforced, if necessary with the help of the executive power. The decisions of courts as well as legislation are generally also available in (possible online) databases.

Legislation and case law form starting points for discussions in academic studies and journals that the judiciary or legislator in turn take as a starting point in confirming or overruling previous cases or amending or maintaining the law. Legislation and case law moreover form starting points for the education of law students. Academics and practitioners,

[139] J. Habermas, *Between facts and norms*, (translated by W. Rehg), MIT press: Cambridge, Mass.1998.

as well as judges, are generally organised in networks – that may also admit students – that provide these actors with education opportunities, makes actors aware of upcoming amendments and interesting other networks or databases, and more generally relevant information. The legislator may in turn consult these expert and practitioner networks. In some legal orders, these networks may also choose to provide information for decisions in particularly important judicial decisions, often in the form of amicus curiae letters. In time, some networks may become particularly prominent, and actors become accustomed to interacting with one another. Over time, these actors gain considerable experience in negotiating and insight in political networks. Also, the role of actors in this traditional background is clear: the legislator develops the law, the judiciary interprets it, private actors rely on it, and experts and academics support the development of private law by making available their experience and expertise.

The clearly delineated role of actors and well-organised interaction between relevant actors in nation states facilitates the development of private law of good private law in various ways.

Firstly, the development of private law within a clear framework, established either by case law or codifications, benefits the stable and accessible development of law. National legislation or case law also provides a framework for the development of self-regulation or co-regulation.

Secondly, the participation of practitioners in the legislative process ensures that legislation does not overlook relevant practices. Also, debate preceding legislation and subsequent elections make clear if legislation is contrary to society's views on justice.

Thirdly, a hierarchical judiciary prevents inconsistent decisions between lower courts and increases the predictable and consistent development of the law. If the law contains numerous blanket clauses, a hierarchically organised judiciary needs to take an active approach to ensure the consistent and predictable as well as responsive interpretation of private law. The more a consistent, predictable interpretation of blanket clauses is ensured, the more a legislator may be inclined to use them, which may benefit private law as they provide sufficient flexibility to ensure that private law is in accordance with legal practices.

Fourthly, the existence of networks and education opportunities for practitioners, and possible expert advice, helps to minimise the chance that decisions contradict one another, which also contributes to predictability and accessibility. The contacts forged between organisations and different stakeholder groups increase the possibilities for rational and ongoing debate, also on controversial topics. Additionally, the debate following the introduction of the law, and the case law developed on legislation may moreover indicate whether legislation gives rise to problems in practice or not.

2.6.2. Developing comprehensible European private law in a multilevel legal order: the role of non-state actors

Especially since codifications have been established, the development of private law has taken place within nation states. However, this picture needs readjustment, in particular in the light of the increased interdependence between actors, which should affect the role of actors and the use of techniques.

Paragraph 2.6.2.1 will consider the increasing role of non-state actors. Paragraph 2.6.2.2. will argue that the increasing role of non-state actors in the development of European private law may diminish the quality of European private law. Paragraph 2.6.2.3. will defend that the increasing role of non-state actors in the development of European

private law may also improve European private law. Paragraph 2.6.2.4 will conclude that that the positive or negative effects of the increasing role of non-state actors depend on the approach towards the increasing role of non-state actors.

2.6.2.1. The increasing role of non-state actors

In the face of societal developments, the view that non-state actors are passive parties that mainly rely upon private law, needs to be corrected. As legislators and judiciaries have had to address increasingly complex issues – for example because they need to cope with ongoing technical developments – they increasingly need to rely upon the expertise and experience of private actors. In other words, interdependence between state actors and non-state actors has increased. The more prominent role of non-state actors also becomes apparent as non-state actors, rather than merely participating in legislative processes, more and more develop self-regulation or participate in the development of co-regulation as a way to prevent legislative intervention. In turn, as these instances of alternative regulation[140] developed, the role of non-state actors becomes more prominent, and abandoning a well-established form of alternative regulation or rejecting non-state actors' insights becomes considerably more difficult.

The increasing role of non-state actors has been reinforced by ongoing Europeanization:

1) In advancing the internal market or consumer protection, European actors need to develop private law in accordance with existing and developing practices, and increasingly need to rely on private actors that are better aware of existing and developing practices.

2) Actors at the European level may expressly encourage the development of alternative regulation and may organise private actors to organise themselves, as this increases the organisations that can enforce especially consumer rights on behalf of their members.

3) The preferences of parties become more important as they are increasingly able to circumvent private law that they find insufficient through choice of law, or choices of jurisdiction. As Europeanization continues and pressures for harmonisation of mandatory law that parties cannot diverge from, these possibilities are not likely to decrease.

4) Non-state actors operating at the international level may have better insight in foreign and transnational practices and they may also be more familiar with relevant foreign and international actors than national state actors that seek to provide rules for matters wiht an inherent cross-border aspect.

5) Non-state actors more and more seek to participate not only in the drafting of legislation but also in drafting self-regulation, thereby taking a more active approahc than in Fuller's legal order.

[140] Alternative regulation refers to initiatives other than legislation. See for a further definition chapter 1, footnote 3.

Consequently, the larger role for non-state actors, and the increased interdependence between state actors and non-state actors set the development of private law in a multilevel legal order apart from the development of private law in nation states.

2.6.2.2. Detriments

The increasing role of non-state actors may have detrimental effects on legal certainty and responsiveness for three reasons. Firstly, problems may arise because more sources of private law become relevant and because the increasing functional development of private law. Secondly, problems may arise because the perspectives of actors differ, and thirdly, problems may arise because state and non-state actors' priorities may not converge.

Firstly, the larger role of non-state actors may lead to the development of more sources of private law and a more functional development of private law, thereby increasing the chance that private law will develop inconsistently and therefore unpredictability. Additionally, as these initiatives and instances develop at a European level, the development of private law may progressively take place beyond the national legal framework, which may diminish the stable development of law. This is particularly the case if non-state actors, inspired by initiatives in other legal orders, try to introduce forms of self-regulation or co-regulation in a legal order that is not familiar with those new forms, or if non-state actors and state actors jointly decide to "experiment" with novel approaches. Also, the rules developed in alternative regulation may not be available to parties, even if they may later become bound by alternative regulation, which may inhibit the accessibility of private law.

Secondly, the perspectives of non-state actors and state actors on how a more comprehensible private law can best be pursued may differ. Private actors may consider that accessibility and responsiveness is best pursued by ensuring that private law is developed by private actors themselves. In contrast, state actors may seek to improve the public availability of rules developed through alternative regulation. Non-state actors may consider that consistency between national law and international initiatives should be improved, while national legislators may reject these international initiatives and emphasise that rules in various areas of national private law should be developed consistently with one another.

Thirdly, the priorities of state actors and non-state actors may diverge. Private actors do not form a uniform group and private actors may contradict one another – consumer organisations prefer developing accessible private law, businesses emphasise predictability and argue for harmonisation, while state actors may be less inclined towards harmonisation. Stakeholders may also seek to "circumvent" the national level, by supporting European initiatives that are rejected by the national legislator, especially if a particular group of stakeholders has a strong position because of its expertise or organisational resources.

Moreover, state actors and non-state actors may have different interests. In particular, stakeholder groups with clearly delineated interests seek to develop European private law in accordance with their interests, while the interests of other parties are overlooked. Of course, state actors may be similarly biased and pursue a particular political aim, which is especially problematic as state actors develop "hard" law, but it is more likely that national legislatures can be held democratically accountable.

2.6.2.3. Benefits

The increased participation of private actors may also contribute to the quality of European private law in various ways. Firstly, an active role of non-state actors may reinforce

legislation and indicate self-regulation or co-regulation where non-state actors are sufficiently capable or indicate legislation where alternative regulation has failed. Secondly, the perspective of state actors and non-state actors in developing a consistent approach towards alternative regulation converges.

Firstly, if private actors have participated actively in the development of rules, they are likely better aware of rules and of new developments. A better understanding of these rules in turn enhances the insight of private parties in the future application of rules, and as private parties understand the logic underlying private law, their insight in potential future reform and accessibility improves. Private actors may moreover emphasise the need for clearly worded provisions, which also enhances predictability, while it is also more likely that private actors will recognise the need to amend the rules. New initiatives may also turn out to advance the consistent development of private law, for example by establishing particularly effective patterns for collective negotiations that may be used consistently in various areas of private law. Thus, the use of alternative regulation may also in accordance with responsiveness. Nonet and Selznick[141] have argued that actors should develop rules in accordance with their institutional background: 'Responsive law aims at *enablement and facilitation*', emphasising the need to pay more attention to institutional design. It follows that if private parties are well-organised and have sufficient expertise, they may be more capable to develop rules through self-regulation than the legislator, and non-state actors' initiatives should accordingly be accommodated. Of course, that does not mean that alternative regulation should necessarily be pursued – if self-regulation, or co-regulation has failed, the development of legislation is indicated. However, this model allows for experimentation that enables developing practices in accordance with requirements of legal certainty and responsiveness.

Secondly, both state actors and non-state actors have a clear interest in developing a consistent approach towards the increasing role of non-state actors by both state actors and non-state actors may contribute to the quality of initiatives established by non-state actors. Importantly, not only state actors play an important role in developing a consistent approach towards instances of alternative regulation. As non-state actors gain a more prominent role, they also gain the responsibility to avoid developing unpredictable, inaccessible, inconsistent, or irresponsive private law. Non-state actors also have a clear interest in preventing failures that could become a cogent argument against the future development of alternative regulation. However, state actors do play an important role in safeguarding the quality of alternative regulation. Thus, arguably, state actors need to gain more insight in the question in which areas where alternative regulation will be successful and in what areas it will be a failure, while they also need to ensure that the development of alternative regulation will not mean that rules are developed primarily by parties with a lot of expertise, experience and financial and organisational resources, at the expense of actors with less expertise and resources. Additionally, state actors need to decide whether they will enforce these rules in a consistent manner.

2.6.2.4. Conclusion on the increasing role of non-state actors

Non-state actors play an important role in the development of European private law. Differently from the legal order, they may play an active role in the development of private law, and especially if non-state actors are not based at a national level, this may not take

[141] P. Nonet, P. Selznick, *Law & society in transition: Toward responsive law*, 1978, p. 111. G. Teubner, 'Substantive and reflexive elements in modern law', *Law & Society Review* 1983, p. 275, goes further by arguing that law should be reflexive, developing and correcting self-regulatory mechanisms and make clear how rule-making processes will develop.

place within a clear legal framework. Non-state actors may pursue various aims that do not necessarily coincide with the aims pursued by national state actors. As the role of non-state actors increases, the role of state actors change and questions whether state actors and non-state actors should develop rules and how the quality of alternative regulation should be safeguarded.

These differences may affect the development of legislation and lead to the development of more alternative regulation. This in turn draws attention to the question in what ways private law could and should be developed, in particular the question whether private law should be developed through legislation or another option, in the form of self-regulation or co-regulation. The increasing role of non-state actors may have both detrimental and beneficial effects on European private law. A consistent approach towards the development, evaluation and enforcement of alternative regulation may contribute to the predictability, accessibility, consistency, and responsiveness of private law. If such an approach is not developed, problems may arise in the form of the fragmented and functional development of alternative regulation that may undermine consistency, the lack of accessibility of alternative regulation to third parties, the development of alternative regulation solely by parties with strong positions, and a lack of predictability on the enforcement of alternative regulation.

2.6.3. Multiple actors developing European private law

An increasing amount of state and non-state actors from different levels simultaneously develop European private law and interdependence between these actors has developed.

Paragraph 2.6.3.1. will consider the increasing amount of actors. Paragraph 2.6.3.2. will argue that the simultaneous development of European private law by multiple actors may have a detrimental effect on the quality of European private law. Paragraph 2.6.3.3. will defend that the simultaneous development of European private law by multiple actors may also have a beneficial effect on the the quality of European private law. Paragraph 2.6.3.4. will conclude that taking into account the initiatives of other actors requires more attention for “techniques” and possibilities for interaction.

2.6.3.1. More state actors

National legislators as well as the European legislator may initiate legislation, which is interpreted by the CJEU and Member States’ courts. The competences between state actors at the European and national level are generally not clearly delineated, and may change as the private law *acquis* develops. If the European legislator develops legislation, this may have direct effect – if it concern Regulations – or legislation has to be implemented by Member States – if it concerns Directives, as is largely the case for the private law *acquis*. Member States are free to decide in which way they implement Directives, as long as the rights conferred upon private parties in Directives are sufficiently clear and precise, enabling private parties to rely upon them. Accordingly, Member States have adopted diverging approaches to the implementation of Directives in their national laws. Their strategies also depend upon the development of national law – in particular, whether private law was or should be codified, or whether private law had mainly developed through case law, complemented by statutory law and regulations.

Directives cannot be directly relied upon before the courts by individuals. Instead, private parties rely on national legislation implementing Directives. The legislation developed

by the European and national legislature, including implementation legislation, is preceded by democratic debate. Directives as well as Regulations are publicly promulgated in all the official languages of the European Union, and implementation laws are promulgated in the official language of the legal order of that implementation law, which means that it is not necessarily accessible to private parties in other legal orders that do not have a proper command of this language, although they may have to rely upon it if they enter into cross-border transactions.

In addition, treaties have been established by international actors. Treaties may have direct effect, depending on their content. The question whether treaties, even if their content aims to directly bind private parties, needs to be implemented in order to have effect, differs between legal orders. Treaties have to be implemented in the European and German legal order, but they do not necessarily have to be implemented in the Dutch legal order. The implementation or ratification of treaties is publicly promulgated in the official languages of the legal order ratifying and implementing that treaty, which means that this ratification or implementation is not necessarily accessible to private parties that do not have a proper command of the official languages of that legal order. However, for treaties, an overview of states that have acceded to and ratified that treaty is usually provided. The absence of a central legislator means that private law is not developed within a framework. Although frameworks still exist at the national level, the private law *acquis* and treaties do not develop within the framework provided by the national legislator or judiciary.

The judiciary in the multilevel legal order is only partially hierarchically organised. The CJEU is competent to interpret European law and determine whether actors have adequately implemented the *acquis*. However, it is only competent to interpret European law, not national private law. The bulk of case law is therefore still developed by national courts. In addition, the adjudication of disputes on the basis of the private law *acquis* takes place at a national level, and lower courts are not obliged to refer questions to the CJEU. Only the highest courts are obliged to do so, but they themselves decide whether a case needs to be referred to the CJEU. The private law *acquis* has developed in a fragmented manner and although the CJEU provides binding decisions, and lower courts need to comply with it, the CJEU has not developed a body of case law similar to national courts that provide a starting point for the development of a consistent body of private law. If the European Union has acceded to treaties, the CJEU is competent to interpret these treaties. If this is not the case, there is generally no supranational court to guarantee the consistent interpretation of international law throughout the Union. Courts in different Member States do not necessarily refer to one another and do not take case law established by one another's highest courts as starting points. Unless it concerns harmonised or international law, they do not need to so, either. As national private laws differ from one another, the decisions of foreign courts do not provide guidance, but merely a source of inspiration.

Although decisions of the CJEU are public and freely available, there are no general databases collecting decisions on the *acquis* from Member States' courts throughout the Union, although some databases on decisions on treaties have been developed. These decisions are not a starting point for debate and education for academics, practitioners, and students in the way that national legislation and case law serve as a starting point for debate in nation states. Instead, national case law and legislation form the starting point for academics, practitioners and students, although practitioners, academics and educators may well consider European legislation and CJEU case law relevant and therefore, selectively, discuss and study these materials. Education is still organised nationally. Similarly, despite the establishment of the European Law Institute and the establishment of European networks,

practitioners and judges are mainly organised nationally. Thus, the European legislator, when considering reform or new legislation, needs to rely upon national networks for consultations that may provide insight in national – not European – practices. It may not be easy for European actors to adequately identify relevant actors and to ensure that debates at the European level sufficiently include all relevant actors. European actors depend on national state actors in this respect. Actors trying to increase their influence may participate in the debate at both the national and European level.

The dependence of European actors on national actors may also mean that a limited amount of actors gain sufficient experience and expertise to negotiate with one another. This may be reflected in the limited participation in the legislative process at the European level, especially when compared to participation at the national level.

As the role of non-state actors increases, they can contribute to more participation, particularly by establishing and participating in networks and by establishing and maintaining databases. However, even if such databases are established, especially linguistic problems may arise that inhibit the accessibility of materials to all interested actors. Moreover, although foreign legislation and case law are interesting materials for policymakers, the immediate interest of these materials for private parties is less clear, especially if they do not have insight in foreign law.

2.6.3.2. Detriments

The increased number of state actors and non-state actors may be problematic for several reasons. Firstly, a larger amount of state and non-state actors leads to more sources of private law. Secondly, the perspectives of state actors at different level on developing European private law in accordance with legal certainty and responsiveness may diverge. Thirdly, the emphasis on requirements may differ between actors.

Firstly, the larger number of actors may be detrimental for the quality of European private law. Especially accessibility and consistency are at risk when more private law sources become relevant. Not only is it more difficult to gain an overview of relevant law sources for private parties, the risk that provisions in these sources contradict one another logically increases. If areas of private law are developed separately, the risk of inconsistencies may increase. Europeanization reinforces an increasingly functional approach that does not take place within a clear legal framework. These developments may decrease the consistency and accessibility of private law, which in turn makes it more difficult for parties to adequately assess their legal position and adapt their behaviour accordingly.

Secondly, actors at different levels may define predictability, accessibility and consistency and responsiveness differently, which also entails that the ways in which these benchmarks will be pursued differs. Thus, predictability for the European legislator entails predictability in cross-border cases, and the harmonisation of national law, whereas predictability, for national legislators and judges, entails the stable development of private law within a clear framework. Similarly, inconsistency for European actors concerns the consistency between private laws, which can be increased through harmonisation, while for national legislators, consistency concerns the consistent development of private law within codifications.[142] Also, accessibility, for European actors, alludes to the accessibility of private law, which can be improved by the clear implementation of law. In contrast, accessibility for

[142] J.M. Smits, 'Contractenrecht als meergelaagde rechtsorde: Uitdagingen voor de komende tien jaar', *Contracteren* 2009, p. 112.

Member States may allude to the involvement of national stakeholder groups in the provision of information and education to their members. Likewise, responsiveness towards society's views at a European level may well be understood differently from responsiveness to these views at a national level, if only because the question arises which actors are to be included in the concept of a "European" society, or indeed, whether such a society is not merely the sum of the societies found in the Member States.[143] Responsiveness towards legal practice may also differ: whereas national states may be better aware of national practices and seek to stimulate national trade and export, the aim of the European Union is not to ensure the trade in a particular state but to ensure that the measures of states – which may have been taken to stimulate national trade – do not pose obstacles to the internal market.

Thirdly, the emphasis on benchmarks may differ between actors, which increases the chance that actors' initiatives may contradict and undermine one another. Thus, while one actor seeks to develop a predictable private law, another actor simultaneously developing related rules instead tries to develop responsive private law. These simultaneous contradictory initiatives may undermine one another, so that the pursuit of both a predictable and a responsive private law is hindered. Moreover, actors may weigh requirements differently; some actors may consider arguments to safeguard an accessible private law more compelling than other actors, and the approach of these actors may differ as a result. Simultaneously, actors do not necessarily consistently pursue one requirement over the other. Instead, they may develop private law for political reasons rather especially as other arguments may also play a role in the development of European private law. Prominent Dutch authors[144] have rightly doubted the usefulness of establishing a hierarchical order between these requirements.

2.6.3.3. Benefits

The development of private law by state and non-state actors at different levels may also contribute to legal certainty and responsiveness in various ways. Firstly, Europeanization and the possibility that other actors develop private law may prompt actors to develop private law in a more predictable, accessible, consistent or responsive manner. Secondly, actors' pursuit of various requirements may reinforce one another and actors may benefit from one another's insights.

Firstly, regulatory competition may prompt legislators to develop the law in accordance with benchmarks facilitating legal certainty. Thus, if legislators perceive that private parties opt for the law of state X that provides predictable outcomes, legislators may try to develop their law similarly to the law of state X. Consistency may also be increased if the "threat" of harmonisation prompts national legislators to reform inconsistent national laws. Also, consistency with foreign laws may increase if judges or legislators are inspired by the reasoning of foreign judges or legislators. Moreover, harmonisation may force Member States to increase the accessibility of private law by codifying rules previously developed in case law. Furthermore, if states reconsider outdated law under the "threat" of harmonisation, this will contribute to the responsiveness of private law to legal practice. Moreover, actors may reallocate legislative competences to actors at levels that are best placed to deal with

[143] For a collection or relatively recent research on this question see M. Góra, Z. Mach (eds.), *Collective identity and democracy, The impact of EU enlargement*, RECON Report 12, Oslo: October 2010, available at http://www.reconproject.eu/main.php/RECONReport1210.pdf?fileitem=4472889.

[144] J.B.M. Vranken, 'Vertrouwen en rechtszekerheid in het overeenkomstenrecht', in: *Vertrouwensbeginsel en rechtszekerheid in Nederland*, Deventer: Tjeenk Willink 1997, par. 8, H. Drion, 'Het rechtszekehrheidsargument', in: H. Drion et al (eds.), *De hanteerbaarheid van het recht*, Tjeenk Willink: Zwolle 1981, p. 3.

particular practices. In particular, state actors may conclude that the Union or international organisations are best placed to deal with matters that have an inherently cross-border element, which is particularly clear in matters of timeshare or package travel, but also for private international law or transport law.

Secondly, actors' initiatives may also reinforce one another. Notably, the multitude of legal sources may prompt actors to ensure accessibility in various ways. State actors can choose to (re)codify private law, or to provide an overview of relevant sources in a different manner – for example through providing an overview of relevant sources at publicly accessible websites, databases, or in handbooks. Also, if actors take into account the experiences of other actors in dealing with the implementation of the *acquis*, they may choose similar implementation methods, which in turn may enhance consistency. Taking into account experiences in the implementation of the *acquis* may also increase the chance that actors carefully consider the advantages and disadvantages of particular strategies towards implementation, and compensate for potential disadvantages. The coexistence of actors may also contribute to the responsiveness of private law, for example if national actors, faced with the continuing development of the *acquis*, consider the increased or more consistent use of consultations and impact assessments in the drafting of harmonisation measures as well as the implementation of Directives. Furthermore, the responsiveness of European measures can be improved if national states, before harmonisation becomes binding, develop similar legislation, which may indicate how these measures will affect legal practice.

2.6.3.4. Conclusion on the coexistence of more state actors developing European private law

The multilevel legal order shows clear differences from the "traditional" nation state in various respects. The increasing amount of actors entails that private law is also developed beyond legal frameworks, and not only through traditional legislation. The roles of actors are moreover subject to change; especially the legislative competences of state actors to develop private law may be reallocated as the private law *acquis* develops further. Also, the judiciary is partially hierarchical, while the legislation and case law produced at the European level does not necessarily form a starting point for actors that remain primarily nationally organised. These developments may have both detrimental and beneficial effects on European private law.

The larger number of actors draws attention to the question which actors should develop European private law and how actors should cope with the increasing amount of initiatives from other actors. In particular, the question how national and European actors should avoid problems and benefit from one another's experience arises.

2.7. Conclusion

This chapter has argued that predictability, accessibility, consistency and responsiveness towards society's legal views on justice and responsiveness to the needs and preferences of legal practice should be used as benchmarks, or requirements, to evaluate the quality of European private law. These requirements have been widely recognised, both at the national level and at the European level.

Requirements of predictability, accessibility, consistency and responsiveness should not be seen in isolation. Instead, pursuing one requirement will often contribute to other requirements. In some cases, however, developing European private law in accordance with

society's legal views on justice has been contrasted to the development of European private law in accordance with requirements facilitating legal certainty. Importantly, no clear hierarchy in these requirements has been recognised.

The involvement of more non-state actors, reinforced by ongoing Europeanization, affects the role of non-state actors and has consequences for the way in which European private law is developed. As non-state actors possess more expertise and more organisational resources, they may play a more important and influentual role in legislative processes, both at the national and European level, and they may also suggest developing alternative regulation rather than legislation, thereby offering alternatives for legislation. This development may both detrimentally and beneficially affect the development of European private law.

The involvement of more state actors leads to interdependence between actors from different levels, but this involvement is not similarly organised and facilitated as is the case in the nation state. The involvement of more state actors and non-state actors may both improve and lessn the quality of European private law.

Thus, these characteristics of the multilevel legal order make the development of European private law considerably more complicated.

Chapter 3: Outlook

3.1. Introduction

In the multilevel legal order, more non-state actors and more state actors have become involved in the development of European private law, which has led to interdependence, which, in turn, should affect the use of techniques in the development of European private law.

The subsequent chapters will consider what this means for the development of European private law in accordance with the benchmarks. Paragraph 3.2. will consider the question what actors are involved in the development of European private law. Paragraph 3.3. will consider the differences and similarities in the roles of actors in the German and Dutch legal order. Paragraph 3.4. will discuss what interdependence means for the use of national techniques. Paragraph 3.5. will turn to the use of techniques in addition or instead of national techniques and paragraph 3.6. will discuss the case studies.

3.2. What actors are involved in the development of European private law?

More actors have become competent to develop private law, and the role of actors is subject to change: in particular, European state actors and non-state actors have gained a more prominent role.

As the role of European actors becomes more prominent, more questions of competence are likely to arise. Similarly, the role of non-state actors grows, and they correspondingly gain more responsibility in ensuring that alternative regulation – especially binding forms of alternative regulation – is developed in accordance with requirements of predictability, accessibility, consistency and responsiveness. The weaknesses of alternative regulation should prompt state actors to limit the competence of non-state actors to establish binding alternative regulation, while the strengths of alternative regulation should move state state actors to take advantage of non-state actors' initiatives. What is the role of non-state actors, and how do state actors compensate for weaknesses while benefitting from strengths, and do they do so satisfactorily?

Chapters 4 and 5 will consider the role of actors in the development of European private law in respectively the German and the Dutch legal order.

As a framework for determining the role of actors has developed in the German legal order, chapter 4 will turn to the actors developing European private law in the German legal order and the underlying framework. Notably, the framework developed in the German legal order is closely interrelated with German constitutional law, and cannot simply be transposed to the Dutch legal order, let alone the European level. Consequently, chapter 5 will attempt to develop a normative framework for the Dutch legal order, based on the concepts underlying the German normative framework.

3.3. Comparing the role of actors

Does a comparison between the German and Dutch legal order reveal differences or similarities between the role of the different actors involved in the development of private law?

And if that is the case, wat does that mean for the way in which European private law is developed and the quality of European private law?

Accordingly, chapter 6 will compare the role of actors in the different legal orders and ask what consequences the differences and similarities in the roles of actors may have for the way in which private law is developed and the quality of private law.

3.4. Interdepedendence, interaction, and the use of techniques

Since more actors have become involved in the development of private law, interdependence has developed. Interdependence between state actors at the national and European level already follows from the shared competence of Member States and the European Union in various areas of European private law.[145] Consequently, actors are less able to independently pursue developing European private law in accordance with the benchmarks, which should affect the use of techniques. Accordingly, it has been argued that the multilevel legal order may have far-reaching consequences for the use of techniques in the development of private law throughout the Union.[146]

Firstly, the interdependence between actors may affect the extent to which techniques may contribute to benchmarks of predictability, consistency, accessibility, and responsiveness.

The need for interaction between state actors at the national and the European level is already recognised in private law – for example, taking into account insights from comparative and international law in the drafting of codifications. Arguably, in these cases, lack of interaction may already entail that national legislators may overlook interesting developments in foreign law that could be valuable for national law.[147] The need for interaction however increases if interdependence develops. This does not mean that as many actors as possible should interact with one another as often as possible – instead, interaction should be more in accordance with the idea of deliberation

It follows that increasingly interdependent actors developing European private law need to interact; they need to be aware that other actors also develop private law, which may influence the extent to which techniques used by these actors safeguard benchmarks of predictability, accessibility, consistency and responsiveness.

Accordingly, interdependence should affect the development of private law through codifications: the need to maintain the predictable and accessible development of private law through codifications should prompt national legislators to develop a consistent strategy towards implementing the *acquis* within or outside of codifications, while the need to safeguard the predictability of private law through these codes should prompt national actors to foresee which areas of private law are to be harmonised. In turn, the European legislator and the CJEU should leave Member States sufficient room for implementing the *acquis*

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[145] Comp. L.A.J. Senden, 'De lidstaten en de kwaliteit van Europese wetgeving: geen consumenten, maar co-actoren', *SEW* 2006, p. 47.

[146] W. van Gerven, S. Lierman, *Algemeen Deel. Veertig jaar later. Privaat- en publiekrecht in een meergelaagd kader van regelgeving, rechtsvorming en regeltoepassing*, Kluwer: Deventer 2010. Although their argument applies to the Belgian legal order, their reasoning may also be applied to other Member States as well – even though the multilayered legal order in Belgium seems particularly complicated. Comp. for an introduction to the constitutional reform in Belgium H. Vuye, 'België: Een staat in hervorming of in ontbinding', *AA* 2008, p. 719, and with regard to future reforms H. Vuye, 'Communautaire pacificatie in België: is de grens bereikt?', *AA* 2008, p. 797. See differently J.M. Smits, 'A radical view of legal pluralism', in: L. Niglia (ed.), *Pluralism in European private law*, forthcoming, via www.ssrn.com, p. 5-6. Interestingly, M. Storme, 'There is nothing like European private law twenty years later', *ERPL* 2012, p. 1-2, points out that the state of European private law is increasingly similar to the state of private law in the 16th century, where multiple sources of private law coexisted.

[147] Comp. R. Zimmerman. 'Schuldrechtsmodernisierung?', in: Ernst & Zimmerman (eds.), *Zivilrechtswissenschft und Schuldrechtsreform*, 2001, p. 22 who notes that if legislators want their legislation to play a role in discussion in other states, or beyond the national level, they should take into account foreign law and international discussion..

within their codes in a manner that does not undermine the consistency and the responsiveness of private law in codes. More generally, the extent to which national legislators safeguard the quality of private law in codifications should give the European legislator pause in intervening with these codes.

Equally, interdependence should affect the use of blanket clauses. National legislators and courts should take into account blanket clauses in the *acquis*. In turn, European actors should carefully consider the importance of blanket clauses in codifications for the responsiveness of private law and take care not to undermine the consistent interpretation of blanket clauses in codifications.

Likewise, European actors should not undermine the development of private law at a national level in accordance with principles that reflect national legal views on justice. Rather, general principles should serve as a starting point for interaction.

The need for interaction in this sense entails two things:

1) Not interacting may undermine predictability, accessibility, consistency and responsiveness.

Thus, the lack of attention of the European Commission for relevant national initiatives in the drafting of the EU code for online consumer rights diminishes the chance that it wil adequately take into account existing practices while overlooking valuable sources of information and actors with considerable expertise in national self-regulation. Thus, the lack of interaction inhibits the responsiveness of a future code and, arguably, thereby also its success. If it is not binding, it is not likely that businesses will choose to comply with a code while they already comply with well-established codes of conduct. Moreover, the development of a code of conduct in addition to already existing codes, both at the national and the European level, is likely to lessen the accessibility of the law.

More generally, as the European legislators and the CJEU play a more important role in the development of private law, national state actors should be familiar with these initiatives as well as future initiatives that may be important for the stable development of the law in codifications. Thus, if national actors take a Regulation or a Directive as a source of inspiration in reforming national law, they should take into account future reforms of these measures. If this is not the case, this increases the chance that future national law will be modelled after European measures that were reformed to address weaknesses arising from previously valid measures. Moreover, especially if it concerns measures that have to be implemented in national law, inconsistencies within national codes and the need for too frequent amendments may arise.

2) Interaction may reinforce attempts to advance predictability, accessibility, consistency and responsiveness

Thus, interaction between the European and the national legislator may make the European legislator more aware of national initiatives that seem particularly well-suited to cope with a problem which is also visible in cross-border situations. Moreover, if a national rule has already been established, this provides more information about how a rule is enforced and applied in practice.

If national legislators are aware that the European legislator is likely to look at successful national rules as a source of inspiration, this may prompt them to make these rules more easily available, which in turn is beneficial for the accessibility of the law.

In areas where interdependence has developed, insufficient interaction may not only lead actors to ignore interesting insights, thus not making use of benefits that may arise from the

coexistence of actors. Instead, problems may arise, for example the incorrect implementation of Directives, or implementation that leaves room for unpredictability.

It may become more complex for actors to interact effectively if more actors are involved in the development of European private law, as it takes more effort to identify relevant state and non-state actors and keep track of their initiatives. Importantly, interaction between actors from different levels and different legal orders is not as well organised as interaction in nation states.

This need for interaction means that if interaction does not take place, it may indicate that problems for European private law will arise or have already arisen.

Notably, the interdependence between actors not only points to the need for interaction between actors, it also means that the development of private law by one actor can affect the development of private law by another actor. Notably, problems of unpredictability, inaccessibility, inconsistency or unresponsiveness of private law at one level may in turn affect private law from another actor, at the same level or at another level.

Thus, more interdependence and the corresponding increased need for deliberation entails higher standards for the process through which European private law is developed. Processes not meeting these standards will undermine the quality of European private law, while processes meeting these standards will contribute to the quality of European private law.

Chapter 7 will ask whether actors in the use of national techniques, have adequately taken into account that other actors develop private law, which can limit the extent to which these techniques can contribute to benchmarks of predictability, accessibility, consistency and responsiveness, and how the use of techniques affects the quality of European private law.

3.5. Techniques in addition or instead of currently used techniques

In the multilevel legal order, multiple techniques have not been developed by one actor competent to develop European private law. Rather, the use of techniques is less coordinated while there is more need of coordination, especially as interdependence is not likely to decrease.

Currently, top-down techniques play a central role in the development of private law, and actors usually overlook that techniques are typically used in combination with another. Specifically, the additional use of bottom-up techniques has been neglected.

Bottom-up techniques presuppose a prominent role of non-state actors. The extent to which techniques increase predictability, consistency, accessibility, and responsiveness may be undermined if state actors do not sufficiently address non-state actors: for example, if consultations ignore input from expert non-state actors, or if consultations do not adequately identify stakeholders. As problems become more complex – for example because of Europeanisation – the role of non-state actors also increases because of the increasing need for non-state actors' expertise and their organisational and financial resources.

Also, whereas the use of techniques at the national level may not be changed, more flexibility exists at the European level. The use of alternative techniques should therefore be considered.

Techniques that will not be separately considered in the case study include the Lamfalussy procedure, the use of which seems confined to financial law. In the light of existing national private law, it is difficult to imagine what a Lamfalussy procedure, extended to private law more generally, would look like. Further techniques that have not been

discussed include education. This is not to deny the benefits that wider education that makes lawyers more aware of foreign and European developments, nor does this thesis deny the role that education plays in facilitating interaction between actors in nation states. However, the effects of education are long-term and hard to assess, and it is wrong to simply consider education as a means to an end rather than an end in itself. Moreover, academic research and scholarly writing may also support the development of private law. Although academic research and scholarly writing may fulfill an important role, it is difficult to pinpoint how academic research in general supports the comprehensibility of private law, especially as academic research need not necessarily lead to developments and the long-terms effects of scholarly writing may be visible only in the long term. Moreover, the question arises whether describing research as a "technique" is accurate, while it may also coincide with the development of soft laws and the development of networks and databases. Therefore, academic research will not be considered separately. Other techniques may have been overlooked; however, the possible alternative techniques that could be used in the development of private law seems a fruitful subject for further research.

Thus, chapter 8 will ask what additional and alternative techniques could contribute to benchmarks of predictability, accessibility, consistency and responsiveness.

3.6. Case study

According to this thesis, the extent to which national techniques may contribute to benchmarks of predictability, accessibility, consistency and responsiveness has become limited as other actors also develop private law. Thus, interdependence has developed.

The case study will look at the law on STC's and consider the quality of the law and the interdependence that has developed in this area. Can problems in the law on STC's or success stories be traced to the recognition of interdependence and sufficient interaction between actors?

Interestingly, the AGB-Gesetz and subsequent articles 305 -310 BGB are considered a success story in Germany; while interdependence has developed also for this area. Has interdependence undermined this success or did the interaction between actors safeguard the quality of this area of law? If not, does that mean that actors do not have to interact?

Could actors use additional or alternative techniques in order to further ensure the comprehensiveness of the law on STC's? What is the optimal combination of techniques in this area and do more specific indications on the use of additional and alternative techniques become visible when suggested for a particular area rather than being considered generally? Notably, an optimal use of techniques does not only depend on strengths and weaknesses of techniques, and the weight that different actors attach to these strengths and weaknesses, but also on the characteristics of an area of law. Perhaps, in the study of a specific area of law, more indications for the successful use of techniques can be found.

Perhaps, the case study will show that an optimal use of techniques lead to a set of rules on STC's that are the object of admiration and delight amongst both scholars and practitioners – or, conversely, that a problematic use of techniques lead to problems and criticism from either legal practice or scholars, or both.

It may even be the case that despite an optimal use of techniques, material private law remains criticised, for example because the law on STC's has developed rapidly and by many actors,

which national legislators did not initially take into account. Conversely, it is possible that the problematic use of techniques does not, as such, directly lead to problems for private parties.

Thus, considering the roles of actors and the use of techniques, is the coexistence of actors problematic or beneficial for the quality of the law on STC's?

Chapter 9 will introduce the case study, explain why this area of law was selected, and outline interdependence in this area.

Chapter 10 will look at the development of the law on STC's in the German legal order, and chapter 11 will consider the development of the law on STC's in the Dutch legal order. Chapter 12 will summarise the more general conclusions that become apparent from the case studies and that may also be relevant for the development of European private law more generally.

Chapter 4: Actors developing private law in the German legal order

4.1. Introduction

What actors develop private law in the German legal order, and what is the role of those actors in the German constutional framework and the European framework?

In particular, this chapter will look at the role of non-state actors under the German constitutional framework and the competence of non-state actors under the TFEU. On the one hand, in the German consitutional framework, the role of especially non-state actors in the development of private law is based on the one hand on the idea of private autonomy ('*Selbstbestimmung*'), the ability of parties to develop themselves through entering into transactions with one another, in accordance with article 2 *Grundgesetz* ('GG'), and the concept of *Fremdbestimmung*, that has also been translated as 'hetero-determination',[148] in Dutch: *heteronomie*.

This concept is the opposite of party autonomy. Rather than deciding for oneself to which rules one is bound, by entering into contracts, becoming a member of assoiciations, or adhering to self-regulation, and rather than indirectly deciding by which rules one is bound by democratically electing actors who develop binding rules or participate in the democratic process, *Fremdbestimmung* refers to the stiuation where other, often non-democratically elected actors, decide for an individual who thereby has little or no autonomy to decide to which rules that individual will be bound. Thus, *Fremdbestimmung* refers to being bound to non-democratically legitimised rules one has also not contracted over.[149] On the other hand, the competence of state actors and non-state actors is much less clear and much less developed under European law, which will also be considered.

The framework to assess the role of actors is closely intertwined with the GG, and it cannot simply be transposed or applied to other legal orders. Yet the concept of private autonomy is widely recognised, while the idea of *Fremdbestimmung* as such is recognised as problematic in other legal orders as well.[150] Therefore, this chapter will argue that the use of private autonomy and *Fremdbestimmung* as analytical concepts to decide whether especially non-state actors should play a role in the development of private law may be interesting for other legal orders.

On the other hand, the competence of state actors and non-state actors is much less clear and much less developed under European law, which will also be considered.

Moreover, as multiple actors participate in the development of European private law, the description of the role in some cases makes apparent that interdependence has developed, in accordance with the analysis of multilevel governance. In turn, this might make it more complicated for actors to develop European private law in accordance with benchmarks of predictability, accessibility, consistency, and responsiveness, while it may also make it more complicated for actors to adequately identify the actor most suited or responsible for the development of European private law in accordance with these

[148] A. Colombi Ciacchi, 'Freedom of contract as freedom from unconscionable contracts', in: M. Kenny, J. Devenny, L. F. O'Mahoney (eds.), *Unconscionability in European private financial transactions*, Cambridge: CUP 2010, p. 12.
[149] See further on the idea of *Fremdbestimmung* par. 4.2.2.
[150] A. Colombi Ciacchi, 'Private autonomy as a fundamental right in the European Union', *ERCL* 2010, p. 303.

benchmarks. Therefore, if interdependence develops between actors, this chapter will draw attention to it. Chapters 7 will analyse in more detail how the interdependence between actors affects the extent to which actors are able to develop private law in accordance with these benchmarks through national techniques.

This chapter will introduce the German consitutional framework in paragraph 4.2, and contrast this framework with the role of actors under European law. Paragraph 4.3. will discuss the development of private law by state actors. Subsequently, paragraph 4.4. will consider the role of state actors and non-state actors in instances of co-regulation, and paragraph 4.5. will turn to the role of non-state actors. Paragraph 4.6. will end with conclusions.

4.2. Central questions on the role of state actors and non-state actors

This paragraph will consider the framework underlying the role of state and non-state actors in the German legal order.

Paragraph 4.2.1. will discuss the traditional contrast between legislation ('*Rechtsnormen*') and contracts ('*Rechtsgeschäfte*') and go on to argue that in this basic model,[151] alternative regulation is a hybrid. Paragraph 4.2.2. will discuss the development of alternative regulation and set out why the development of alternative regulation may be problematic, introducing the concept of *Fremdbestimmung* in more detail and contrasting it with private autonomy. Paragraph 4.2.3. will consider the development of legislation or alternative regulation that may affect constitutional rights. Paragraph 4.2.4. will draw attention to the role of actors under European law. Paragraph 4.2.5 will turn to the role of state actors and non-state actors in the development of European legislation or alternative regulation and paragraph 4.2.6 will consider the the development of European alternative regulation that affects constitutional rights. Paragraph 4.2.7. will compare the role of state actors and non-state actors in the German framework and European law.[152] Paragraph 4.2.8. will end with a conclusion.

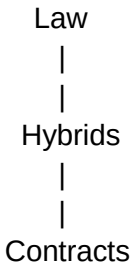
4.2.1. The distinction between law and juridical acts as a basis for binding rules

Traditionally, individuals can either be bound by juridical acts ('*Rechtsgeschäfte*'), which are legitimated by one's own choice, in accordance with private autonomy, in accordance with article 2 GG. Alternatively, one can be bound by the law ('*Rechtsnormen*'), which is democratically legitimated, in accordance with article 20 GG. This distinction is not unfamiliar in other legal orders.[153]

Correlated with this distinction is a central assumption that state actors may bind people because state actors develop rules in the public interests. Private parties may not bind each other without consent because they typically pursue their own interests that do not necessarily coincide with third parties' interests,[154] while they are also not directly bound to constitutional rights. However, between these alternatives, alternative regulation has

[151] This is a simplistic model that does not aim to describe reality in detail but rather to enable discussion of the basic principles involved. After par. 4.2.1. has introduced this model, subsequent paragraphs will discuss the development of private law through "traditional" legislation and alternative regulation in more detail.
[152] This research will not separately consider the views of international actors on this point, as international law may be developed by a range of different actors that may adopt divergent approaches towards concepts of individual autonomy underlying the German normative framework.
[153] See further chapter 5 that discusses this distinction in the Dutch legal order.
[154] W. Schmidt-Rimpler, 'Grundfragen einer Erneuerung des Vertragsrechts', *AcP* 1941**,** p. 156, 159, 161, 164.

developed as a sort of hybrid. Thus, rather than a contrast, the following simplified model can be imagined:



On the one end of the spectrum, people decide to contract with one another, ande at the other end of the spectrum, people are bound by the law. Yet in this spectrum, hybrid forms have also developed. In these hybrids, private actors develop rules that are not only binding on themselves, but that may also be binding on third parties. Private actors may develop *Rechtsnormen*, for example through collective labour agreements ('*Tarifverträge*', hereafter: 'TV') that contain *Rechtsnormen*, in accordance with article 1 par. 1 *Tarifvertragsgesetz* ('TVG'). Generally, agreements between works councils ('*Betriebsrate*') and employers ('*Betriebsvereinbarungen*', hereafter: 'BV') are also considered *Rechtsnormen*. Also, the possible use of guidelines on fair competition ('*Wettbewerbsrichtlinien*') may be taken into account in the interpretation of blanket clauses,[155] as they reflect stakeholders' views on fair commercial practices. More generally, the view that private parties lack the perspective of the public interest can be questioned if various private parties cooperate to draft rules in the public, instead of their own, interest, as is also recognised by state actors.[156] Accordingly, a strict division between law and contracts has been considered outdated.[157]

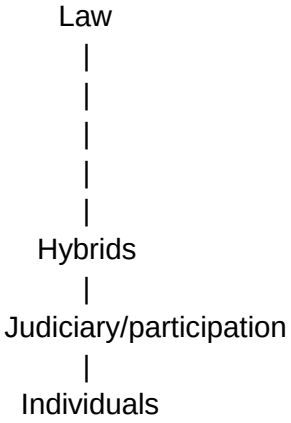
4.2.2. Problems of *Fremdbestimmung*

If private law is developed through hybrids, private actors that do not pursue the interests of third parties may nevertheless bind those third parties. Actors developing hybrids may limit the private autonomy of parties, if they impose rules on third parties that are not based on the law and that parties have not consented to. Yet problematically, non-state actors developing these hybrids pursue their own interests, have not been democratically elected, and are not bound to the GG. The possibility that private actors pursue their own interests gives rise to concern with regard to one-sided rules or rules that pursue the interest of one group instead of the public interest that are imposed on other actors.[158] Moreover, rules developed in these hybrids may well replace the rules that private actors would have consented to – which would logically be rules in the own interests of those private parties – had hybrids not developed. In other words, *Fremdbestimmung* may limit the private autonomy of parties:

[155] Köhler/Bornkamm/UWG/Köhler (2012), article 4 nr 10.45. Harte-Bavendamm/Henning-Bodewig/Gesetz gegen den unlauteren Wettbewerb/Schünemann (2009) article 3, nr 159 note that breach of these guidelines need not necessarily constitute an unfair commercial practice, and provide a further overview of *Richtlinien*.
[156] Comp. for example U. Di Fabio, 'Selbstverpflichtungen der Wirtschaft – Grenzgänger zwischen Freiheit und Zwang', *JZ* 1997, p. 970.
[157] G. Bachmann, *Private Ordnung*, p. 120.
[158] P. Buck-Heeb, A. Dieckmann, *Selbstregulierung im Privatrecht*, Mohr: Tübingen 2010, p. 278.

Thus, while *Fremdbestimmung* does not arise if parties are bound by either the law or by contracts,[159] it may arise in cases of alternative regulation, where private actors have developed rules that may become binding on other individuals, either through co-regulation or through reinforced self-regulation.

However, abandoning the development of hybrids is neither desirable nor realistic. Rather, *Fremdbestimmung* may be compensated by control mechanisms that subject alternative regulation to some control and thereby limit non-state actors' roles. These control mechanisms may take various forms: extensive drafting processes, depending on the extent to which alternative regulation imposes rules on third parties, and constitutional requirements should as far as possible be met.[160] These efforts may include increasing participation of representative actors, and making clear how their interests and comments have been taken into account.[161] *Fremdbestimmung* may also be an argument for judicial control over the content of alternative regulation. Thus, in this perspective, alternative regulation is developed within the framework of the law, while additional controls would compensate for potential *Fremdbestimmung*:



As the drafting process of alternative regulation becomes more inclusive and transparent, judicial control may become less intense, and it may be assumed that parties involved in alternative regulation have managed to create rules that are not unevenly to the detriment or

[159] However, *Fremdbestimmung* may also arise if the bargaining process on which the contract should be based shows shortcomings; see further par. 4.4.1.
[160] S. Augsberg, *Rechtsetzung zwischen Staat und Gesellschaft*, Ducker & Humblot: Berlin 2001, p. 84-85.
[161] Buck-Heeb and Dieckmann 2010, p. 278.

benefit of one group of stakeholders.[162] These compensatory measures may however also decrease the flexibility of alternative regulation.

4.2.3. German alternative regulation and constitutional rights

The question whether private law should be developed through traditional legislation or alternative regulation becomes especially important if the rules that are developed affect constitutional rights. Importantly, the BVerfG[163] has established that all matters directly affecting constitutional rights should be dealt with by formal laws (the '*Wesentlichkleitsdoktrin*'), which stands in the way of binding alternative regulation that interferes with third parties' constitutional rights. However, this doctrine does not mean that private actors may not develop alternative regulation. Rather, possible defaults in the drafting process should be compensated, for example through control from the legislator or the judiciary.[164] Notably, the development of alternative regulation may fall within the sphere of the freedom of association and private autonomy. Also, the *Wesentlichkeitsdoktrin* does not necessarily block private actors' involvement in the development of private law; on the contrary, state actors need to make use of the best suitable instrument when pursuing a specific aim (the *Effektivitätsgebot*), which may well entail including private actors.[165] The BVerfG[166] has expressly considered the underlying reasons for the *Effektivitätsgebot*:

> 'Die Verleihung von Satzungsautonomie hat ihren guten Sinn darin, gesellschaftliche Kräfte zu aktivieren, den entsprechenden gesellschaftlichen Gruppen die Regelung solcher Angelegenheiten, die sie selbst betreffen und die sie in überschaubaren Bereichen am sachkundigsten beurteilen können, eigenverantwortlich zu überlassen, und dadurch den Abstand zwischen Normgeber und Normadressat zu verringern. Zugleich wird der Gesetzgeber davon entlastet, sachliche und örtliche Verschiedenheiten berücksichtigen zu müssen, die für ihn oft schwer erkennbar sind und auf deren Veränderungen er nicht rasch genug reagieren konnte.'

The BVerfG[167] has further established the '*Stufentheorie*', which provides that imposing intense limitations of constitutional rights is reserved to the legislator. The question whether private actors may interfere with third parties' constitutional rights depends on the intensity of this interference and may only take place in the public interest. Moreover, the legislator may not blindly delegate all his authority to non-state actors but needs to retain some level of control.

4.2.4. The role of actors under European law

The well-developed framework in the German legal order and its underlying principles offer a critical perspective on legislative practices of foreign and European actors.

The roles of actors under European law, which has not developed a similar framework, are much less clearly delineated. The subsequent paragraphs will consider the role of state and non-state actors under Euroepan law and

[162] Buck-Heeb and Dieckmann 2010, p. 264, 279, 283, J. Köndgen, 'Privatisierung des Rechts', *AcP* 2006, p. 523.
[163] BverfG 9. 5. 1972 - 1 BvR 518/62 u. 308/64, *NJW* 1972, 1504, par. C II 3.
[164] Augsberg 2001, p. 99.
[165] Augsberg 2001, p. 87-88,.
[166] BVerfG 9. 5. 1972 - 1 BvR 518/62 u. 308/64, *NJW* 1972, 1504, C 2.
[167] See more recently BVerfG 13. 7. 2004 - 1 BvR 1298/94 u.a., *NJW* 2005, 45, par. C II 2 b

4.2.5. The distinction between legislation and alternative regulation at the European level

European law provides much less clarity on the role of actors, both state actors and non-state actors. That does not mean that state actors do not play an important role in the development of European private law; the largest part of the private law *acquis* consists of legislative measures and the CJEU has also played a prominent role in interpreting these measures. Rather, it is not clear how the tasks in developing European private law are allocated between the European and the national level. As European legislative competence is functional and may develop as problems for the internal market within the sense of article 114 TFEU arise, these competences are and will remain not strictly delineated.

The role of non-state actors is less clear – no coherent view can be detected at the European level. Although principles of private autonomy and democracy have been recognised at the European level, the development of alternative regulation has not been problematised because of potential *Fremdbestimmung*. Instead, the European Commission has distinguished between legislation and alternative regulation, emphasising principles of democratic legitimacy, subsidiarity and proportionality.[168]

The European Commission[169] considers the use of alternative regulation as a means to support the "community method", i.e. the development of European legislation. Thus, the initiatives of non-state actors are subjected to European policy aims. Notably, alternative regulation must be in accordance with European law and the principles of transparency, representativeness, and of 'added value to the general interest',[170] but it is not clear when these requirements are satisfied. Interestingly, the White Paper on Governance[171] places the responsibility of complying with these principles with non-state actors.

4.2.6. The European view: Alternative regulation and fundamental rights?

The Interinstitutional Agreement[172] excludes the use of alternative regulation in cases where fundamental rights are at stake. Yet this apparent rejection is not in accordance with initiatives that may well affect constitutional rights – in particular the European social dialogue.

Possibly, however, the development of alternative regulation at the European level is more difficult from a political perspective, especially if Member States are critical of the possibility that rules developed beyond the legislative process at the European level may affect constitutional rights. The existence of successful national alternative regulation may be another reason to exclude additional European alternative regulation.

4.2.7. Comparison

Various similarities, but especially differences, have become visible between the role of actors under the German framework and under European law.

State actors play a primary role both in the German legal framework and in European law, as apparent from the development of traditional legislation by both German and

[168] OJ 2003 C, 321/01, 31.12.2003, par. 2, 16.
[169] European Commission, *European governance, a white paper*, COM (2001) 428 final, p. 8.
[170] OJ 2003 C, 321/01, 31.12.2003, par. 17.
[171] COM (2001) 428 final, p. 15.
[172] OJ 2003 C, 321/01, 31.12.2003.

European actors, and the role of the courts in subsequently interpreting, applying and developing the private law *acquis*.

However, beyond the prominent role of state actors, many differences become apparent between the role of actors in the development of European private law.

1) Whereas a framework has been carefully developed at the national level, no similar framework has been developed for the European level.

2) The development of alternative regulation, and, correspondingly, the role of non-state actors, has not been problematized because of *Fremdbestimmung*. Therefore, European law has also not consistently developed control mechanisms to limit the role of non-state actors. As a result, non-state actors at the European level may play a larger role than actors at the national level, if their initiatives pursue European policy aims.

3) Simulaneously, non-state actors have a smaller role under European law than under the German framework, as the GG protects the role of non-state actors. More particularly:

a. The role of non-state actors in the German framework can be seen in the light of constitutional rights, whereas this view is not apparent at the European level. The German view is however limited, as article 19 par. 3 GG stipulates that the constitutional rights are applicable for domestic legal persons.[173] Foreign businesses may invoke the provisions from international treaties.[174] Consequently, at the European level, the development of alternative regulation is not considered as a goal in itself, but as a means to support European legislative interventions in terms of (democratic) legitimacy, effectiveness, and transparency.[175]

b. Non-state actors have a smaller role under European law than under German law, as becomes apparent from the European definition of co-regulation: 'the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field'. The rejection of alternative regulation in cases where fundamental rights are affected and these definitions implies a top-down approach,[176] which is difficult to reconcile with the German view that the drafting of alternative regulation can be an exercise of constitutional rights. In particular, the selection of representative actors by the European Commission is difficult to reconcile with the pursuit of constitutional rights.

[173] Vieweg 1990, p. 145 notes that this limitation gives the German legislator room to adequately deal with for example multinationals.
[174] Maunz/Dürig, Grundgesetz-Kommentar/Remmert (Ergänzungslieferung 2012), article 19 par. 3, nr 19 et seq, who doubts, in nr 1, whether this limitation is compatible with European law.
[175] L. Senden, 'Soft law, self-regulation and co-regulation in European law: Where do they meet?', *EJCL* vol. 9.1., 2005, p. 9.
[176] See for example Directive 97/7 on distance contracts, which provides, in consideration 18 in the preamble to the Directive, that its minimum rules could be supplemented by codes of practice. In its Recommendation (92/295/EC, OJ L 156/21 on codes of practice for the protection of consumers in respect of contracts negotiated at a distance), the European Commission recommended that trade associations of suppliers should adopt codes of practice and provided for a list of points to be adopted in the codes, and provided, in the annex, a number of points that these codes had to address.

c. The *Effektivitätsgebot* implies that non-state actors develop self-regulation or co-regulation. In contrast, the European legislator emphasises non-state actors' role in strengthening legislation.[177]

4.2.8. Conclusion on central questions

The carefully developed German framework benefits the consistency and the clarity of the law on the roles of actors. It may be contrasted with the European approach that is more oriented towards pursuing European policy aims. Because the German framework rightly stresses the right to party autonomy, it is much better suited to underline the need for action on the part of private actors. However, it has become clear that the German approach may lessen the flexibility of alternative regulation. For German actors, more pragmatic approaches developed by foreign and European actors may draw attention to the possibility that developing extensive mechanisms to compensate for potential *Fremdbestimmung* may undermine some of the strengths of alternative regulation.

4.3. State actors

This paragraph will ask what role state actors play in the development of private law. Paragraph 4.3.1. will discuss the role of German state actors. Paragraph 4.3.2. will consider the competences of European and international state actors.[178] Paragraph 4.3.3. will end with a conclusion that points out the different role of state actors under the GG and the TFEU and draw attention to the interdependence between actors and the resulting need for interaction.

4.3.1. The national legislator and the judiciary

The legislator has played a central role in developing private law through codifications. *General* private law, codified in the *Bürgerlich Gesetzbuch* ('BGB'). is applicable for all citizens, while private law for particular groups of parties has been developed in separate statutes and codes ('*Sonderprivatrecht*'), such as the code on commercial law ('*Handelsgesetzbuch*', or 'HGB'), but also the act on the limited liability company ('*Aktiengesetz*' or 'AktG').[179]

Notably, the introduction of the BGB did not entail that judges were reduced to "mouthpieces" of the law, nor did it limit the role of scholars.[180] Instead, the inclusion of general principles and blanket clauses in the BGB has enabled the judiciary to develop private law without continuous interference from the legislator.[181]

Although the BGH is the highest court competent to interpret private law, it should refer to the BVerG when the interpretation of private law touches upon the interpretation of the GG.[182] Notably, the BVerfG only determines whether the GG has been interpreted correctly; it is not a higher instance that looks at the correct interpretation of private law. The

[177] L. Senden, 'Soft law, self-regulation and co-regulation in European law: Where do they meet?', *EJCL* vol. 9.1., 2005, p. 9.
[178] This chapter has chosen to firstly consider German actors and subsequently turn to the role of European and international actors, even though national binding law may have to be set aside because of European law. However, international and European rules are much less developed than German private law and are considerably more fragmented than German law. Also, European law, when developed through Directives,cannot be invoked directly between private parties, who instead but has to be implemented by the German legislator andthe judiciary.
[179] See further MunchKomm zum BGB/Säcker (2012), introduction, nr 1.
[180] See critically J. Stürner, 'Der hundertste Geburtstag des BGB –nationale Kodifikation im Greisalter?', *JZ* 1996, p. 752.
[181] Staudinger Komm zum BGB/Coing/Honsell (2011) introduction, nr 30.
[182] BVerfG 15 January 1958, *NJW* 1958, 257 (Luth), 257-258.

courts have taken an active approach in interpreting private law in accordance with the needs of legal practice, which has included *contra legem* interpretation.[183] The active approach of the judiciary may also entail that the BGH or the BVerfG establishes a rule, if the legislator, despite a constitutional obligation to do so, has steadfastedly not provided rules to adequately cope with a specific problem.[184]

Articles 3 and 20 par. 2 GG establish the limits of judiciary discretion. A relatively recent decision from the BverfG[185] however makes clear that the judge may not replace an established legislative framework with his own model. The active approach of the judiciary has at times been subject to criticism,[186] especially the reasoning in the decisions from the BverfG in the area of private law.[187]

4.3.2. The development of private law beyond the national level

This paragraph asks what role the European legislator and judiciary and international actors play. Paragraph 4.3.2.1. will consider therole of European actors and paragraph 4.3.2.2. will consider the role of international actors. Paragraph 4.3.2.3. will consider how the approach of national actors affects the development of private law at the European level and conversely, how the approach at the European level may affect the development of private law at the national level.

4.3.2.1. European actors developing private law in the German legal order

This paragraph will first consider the competence of European actors and go on to consider German constitutional law on the relation between Germany and the European legal order, contrasting the German view with the European view that has become apparent from CJEU case law.

4.3.2.1.1. The competence of European actors under the TFEU

European actors play a prominent role as European law, once established, precedes national law, independently of national legislation.[188] The Lisbon Treaty provides the European legislator with a wide range of legislative competences that also enable the European legislator to harmonise private law. In particular, article 81 TFEU, article 169 TFEU and article 352 TFEU, and most frequently, article 114 TFEU, have been used as legal bases.

Article 4 par. 2 TFEU makes clear that these competences are competences that are shared between the Union and its Member States. Thus, national actors still play a role if harmonisation has been established. The reallocation of legislative competences to the European level, and the role of European and national actors, depends on the measure – a Directive leaves more room to Member States than a Regulation – and the degree of harmonisation pursued by that measure. The Directives in the private law *acquis* pursue both

[183] R. Zimmerman, *The new German law of obligations, Historical and comparative perspectives*, OUP: Oxford 2005, p. 18-19, 30.
[184] See U. Diederichsen, *Die Flucht des Gesetzgebers aus der politische Verantwortung im Zivilrecht*, Müller: Karlsruhe 1974, p. 44- 49.
[185] BVerfG 25 January 2011, *NJW* 2011, 836, par. B 4.
[186] See for example MunchKomm zum BGB/Säcker (2012), introduction, nr 75. Staudinger Kommntar zum BGB/Coing/Honsell (2011), introduction, nr. 30.
[187] In particular U. Diederichsen, 'Das Bundesverfassungsgericht als oberstes Zivilgericht – ein Lehrstück der juristischen Methodenlehre', *AcP* 1998, p. 171.
[188] CJEU 15 July 1964 (Costa v E.N.E.L.), case 6-64, [1964] ECR, p. 585. CJEU 7 March 1985 (Van Gend & Loos NV v Inspecteur der Invoerrechten en Accijnzen), case 32/84, [1985], ECR, p. 779.

minimum and maximum harmonisation, and a suggestion for a Regulation pursuing optional harmonisation – the proposal for a Regulation on a Common European Sales Law[189] – has also been made. Also, the scope of a measure, which is often limited, is important for the reallocation of competences to the European level.

In the area of private international law, article 81 TFEU has served as a basis for a range of measures in cross-border cases.[190] Article 169 TFEU has not served as an independent legal basis, but article 169 par. 2 sub a TFEU refers to article 114 TFEU and thereby permits the use of article 114 TFEU as a legal basis for advancing consumer protection. Article 352 TFEU provides the European legislator with a residual competence that requires unanimity.[191] The majority of measures in the *acquis* is based on article 114 TFEU, promoting the internal market, consumer protection, or both. This is an ambiguously worded competence, the limits of which are unclear, that confers a wide range of competences to develop private law on the European legislator.[192] Because the TFEU only confers competences on the Union to intervene in cases where that promotes the aims of the Treaties, the approach of the European legislator is necessarily an instrumentalist approach.[193]

The *acquis* in the area of private law mainly consists of Directives that leave the German legislator some leeway with regard to their implementation, mostly within the BGB.[194]

Moreover, the role of European actors may be increased by primary European law.[195] The most visible influence in the area of private law on the basis of the Treaty has been the development of Member States' liability for infringing Union law, as established in *Francovich*,[196] *Brasserie du Pêcheur*,[197] and *Dillenkofer*.[198]

Additionally, European law may in some cases also affect contracts,[199] including collective labour agreements and collective actions aimed at entering into a collective labour agreement.[200]

Furthermore, the role of the European legislator increases as it enters into treaties, typically ratified through Regulations[201] on the basis of article 216 TFEU and in accordance

[189] COM (2011) 635 final.
[190] Because of the reservations of Denmark (protocol 22 on the position of Denmark) and the United Kingdom and Ireland (protocol 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice) to this part of the Treaty, measures adopted under this title do not bind these Member States.
[191] The BVerfG has maintained that it is competent to evaluate whether European measures have been established ultra vires as this could constitute a breach of the GG, see further below. Particularly, BVerfG 30 June 2009 2 BvE 2/08 u.a. *NJW* 2009, 2267 (Lisbon Treaty) set limits to the use of article 352 TFEU, as this residual legislative competence may lead to tensions with the principle of conferral. See critically J. Basedow, 'Ende des 28. Modells? – Das Bundesverfassungsgericht und das europäische Wirtschaftsprivatrecht', *EuZW* 2010, p. 41, who rightly points at successful measures under this article.
[192] See further E.A.G. van Schagen, 'More consistency and legal certainty in the private law acquis: A plea for better justification or harmonisation of private law', *MJ* 2012, p. 37 et seq.
[193] Comp. N. Jansen, R. Michaels, 'Private Law and the State: Comparative Perceptions and Historic Observations', *RabelsZ* 2006, p. 10.
[194] See further on the approach of the legislator to the implementation of the *acquis* chapter 10.
[195] Either national legislation or case law: see for example the judgements of CJEU 24 January 1991 (Alsthom Atlantique SA v Compagnie de Construction), C-339/89, ECR 1991, p. I-107 and CJEU 13 October 1993 (CMC Motorradcenter GmbH v Pelin Baskiciogullari), C-93/93, ECR 1993, p. I-5009.
[196] CJEU 19 November 1991 (Francovich and Bonifaci and others v Italian Republic), joined cases C-6/90 and C-9/90, [1991] ECR p. I-5357.
[197] CJEU 5 March 1996 (Brasserie du Pêcheur SA v Bundesrepublik Deutschland), joined cases C-46/93 and C-48/93, [1996] ECR p. I-1029.
[198] CJEU 8 october 1996 (Dillenkofer and others v Bundesrepublik Deutschland), Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, [1996] ECR, p. I-4845.
[199] CJEU 22 January 1981 (Dansk Supermarked A/S v A/S Imerco), C-58/80, ECR [1981], p. 181, or CJEU 8 April 1976 (Defrenne 2), 43/758, ECR 1976, p. 455
[200] CJEU 11 December 2007 (International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti), C-438/05, [2007] ECR, p. I-10779 and CJEU 18 december 2007 (Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet), C-341/05, [2007] ECR, p. I-11767.
[201] See for an overview http://ec.europa.eu/world/agreements/default.home.do.

with the negotiations procedure prescribed under article 218 TFEU.[202] The CJEU decision in AETR[203] makes clear that the European legislator is competent to renegotiate on treaties that have been ratified by the European legislator if they are revised.[204] It follows that if, for example, the Montréal Convention is to be revised, the competence to negotiate has been reallocated to the European legislator.

The ratification of treaties by the European legislator also means that the CJEU becomes competent to interpret treaties. This means that national courts should refer questions on these treaties to the CJEU. Arguably, in turn, the CJEU should refer to previous national interpretations of the Europeanised treaty in the interests of predictability and consistency, which may however be difficult if those decisions are not easily available or if interpretations of courts in different Member States contradict one another.

Moreover, where it concerns the interpretation of treaties that have also been ratified by third countries, it would be in the interest of consistency and predictability to refer to decisions on treaties in those third countries, provided that they are available.[205] In some cases, competence to interpret treaties had already been referred to the CJEU, for example with regard to Regulation Brussels I.[206]

4.3.2.1.2. The competence of European actors under German constitutional law

German constitutional law on the reallocation of competences to the European level consistently emphasises the principle of democracy and the protection of constitutional rights, thereby putting restraints on the increasing role of European actors.

This German constitutional framework can be described as follows. Under article 23 GG, Germany can reallocate competences to the European level, with permission from the *Bundesrat*. Article 23 GG stipulates that to realise European integration, Germany will work with the European Union as it similarly recognises principles of democracy, the *Rechtsstaat*, subsidiarity, as well as social and federal principles, in articles 1 and 2 TEU, while the European Union also provides protection of constitutional rights similar to the GG. Article 23 GG obliges German state actors to promote compliance of the European Union with these standards.[207] Moreover, the protocol on subsidiarity and proportionality to the Lisbon Treaty has enhanced the role of national parliaments which have gained the competence to lodge a complaint before the CJEU if they find that a European measure violates the principle of subsidiarity. Accordingly, par 1a has been inserted into article 23 GG.

The reallocation of legislative competence also increases the role of the CJEU. The BVerfG[208] has emphasised that not referring questions to the CJEU when that is indicated, by highest courts, is contrary to article 101 par. 1 GG that stipulates that parties cannot be denied from being heard by the competent judge according to the law. However, this doctrine

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[202] See for the limits on this competence CJEU 28 March 1996, opinion 2/94, [1996] ECR p. I-1759 on the accession to the ECHR, in which the CJEU held that no provisions in the TFEU conferred competence on the Union to enact rules in the areas of human rights, while the residual competence – current article 352 TFEU – did not justify widening the scope of the Union's competence or result in amending the Treaty without the procedures indicated for such a change. This has not stopped the CJEU from referring to the ECHR (see CJEU 18 June 1991, (Tiléorassi AE, Omospondia, and Prossopikou v Pliroforissis, Kouvelas, Avdellas and others), C-260/89, ECR [1991], p. I-2925, par. 41). Article article 218 par 6 sub a under ii now expressly refers to accession to the ECHR.

[203] CJEU 16 January 2003, (Cipra and Kvasnicka v Bezirkshauptmannschaft Mistelbach), C-439/01 ,[2003] ERC, p. I-745.

[204] See for an overview of treaties entered into by the EU http://ec.europa.eu/world/agreements/default.home.do.

[205] This is however not always the case: comp. CJEU 10 July 2008 (Emirates Airlines v Schenkel) , C-173/07, [2008] ECR, p. I-5237, par. 43-46.

[206] Protocol of 3 June 1971 on the interpretation by the Court of Justice.

[207] BT-Drucks. 12/6000, p. 20.

[208] BVerfG 9 January 2001 - 1 BvR 1036/99, *NJW* 2001,1267.

has been applied strictly: if a case is decided apparently in accordance with a European measure, complaints are not upheld. This decision may constitute a breach of article 6 ECHR, but more importantly, it may also be difficult to reconcile with CJEU decisions under article 267 TFEU.[209] Moreover, the insistence that the BVerfG[210] remains competent to evaluate whether European measures breach the GG may also be difficult to reconcile with the primacy of European law. However, the *Honeywell* decision shows that the BVerfG exercises restraint in this matter.[211] Also, despite the restraint of the BVerfG, the roles of the CJEU and the ECHR increase as the BVerfG frequently refers to these courts.[212]

For far-going reallocation of competences from the national to the European level that necessitate amendments to the Treaties, the GG provides more restraints. Accordingly, article 79 par 2 GG requires a two-third majority in both the *Bundestag* and the *Bundesrat*. Article 79 par 3 GG prohibits amendments that affect states' roles in the federal state, states' participation in federal legislation, or the rights recognised in articles 1-20 GG.

Thus, the reallocation of competences to the European level is stipulated by national law. This is confirmed by BVerfG case law[213] on article 79 par. 3 GG. The BVerfG has held that article 79 par. 3 GG entails that public tasks and acts of public authority should be sufficiently democratically legitimated by national parliaments, while the European Parliament additionally safeguards democratic legitimacy. Thus, the BVerfG distinguishes between democratic requirements at the national and at the transnational level and it has maintained competence to evaluate whether European measures are *ultra vires*. As integration continued, the democratic legitimation of the Union should increase, while democracy within Member States should also be maintained. National democratic safeguards should prevent that too much competence is reallocated to the European level. Specifically, legislation conferring competences to the transnational level should be sufficiently precise, respecting the principles of conferred competences, the lack of *Kompetenz-Kompetenz* at the European level.

The BVerfG further limited the reallocation of competences on central political questions in the sphere of personal development and social policy, including decisions fundamental for forming living conditions and fundamental decisions of cultural significance, in particular family law. It has been argued that private law constitutes law that is important for shaping one's living conditions,[214] which would mean that the European legislator not gain general legislative competence for private law and its role in this area would remain subject to consitutional limitations, leaving a central role for national legislators and courts. However, the assumption that especially contract law is essential for shaping one's living conditions has also been challenged,[215] and it is not clear whether the BVerfG will eventually set such a limitation.

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[209] Similarly critically W. Roth, 'Verfassungsgerichtliche Kontrolle der Vorlagepflicht an den EuGH', *NVwZ* 2009, p. 345.
[210] BVerfG 12 October 1993, 2 BvR 2134/92 and 2 BvR 2159/92, *NJW* 1993, 3047 (Maastricht Treaty)
[211] BVerfG 6 July 2010 2 BvR 2661/06, *NJW* 2010, 3422.
[212] See further R. Nickel, 'Zur Zukunft des Bundesverfassungsgerichts im Zeitalter der Europäisierung', *JZ* 2001, p. 625.
[213] BVerfG 12 October 1993, 2 BvR 2134/92 and 2 BvR 2159/92, *NJW* 1993, 3047 (Maastricht Treaty), referring to BVerfG 29 May 1974 - 2 BvL 52/71, *NJW* 1974, 1697, BVerfG 22 October 1986 - 2 BvR 197/83, *NJW* 1987, 577 (the Solange decisions), confirmed in BVerfG 30 June 2009 2 BvE 2/08 u.a. *NJW* 2009, 2267 (Lisbon Treaty) and BVerfG *NJW* 2012, 3145.
[214] The European legislator has emphasised this reasoning in various Directives, for example considerations 3, 4, 6, and 7 in the preamble to Directive 2008/48 on consumer credit. More elaborately H.-W. Micklitz, 'German Constitutional Court (Bundesverfassungsgericht BVerfG) 2 BvE 2/08, 30. 6. 2009 – Organstreit proceedings between members of the German Parliament and the Federal Government', *ERCL* 2011, p. 532.
[215] Comp. for example the alternative impact assessment for a Directive on consumer credit conducted by Oxera, *What is the impact of the proposed Consumer Credit Directive?*, April 2007, available at www.bba.org.uk.

4.3.2.2. The role of actors under the TFEU and the GG and interdependence

More actors – especially the European legislator and the CJEU – have become involved in the development of law, but neither the BVerfG nor the CJEU and the European legislator have based their decisions on the assumption that interdependence has developed and that more interaction is therefore necessary. Rather, although both national actors and European actors have recognised the competences of other actors, they have interpreted other actors' roles in a limited manner while simultaneously reasserting their own competences under diferent frameworks – respectively the TFEU and the GG – and the perception of actors' roles from especially the CJEU and the BVerfG therefore contradict one another in the following respects:

1) The BVerfG bases the binding effect and the priority of European law upon article 23 GG. In contrast, the CJEU has held that the binding effect and the priority of European law follow from the European legal order.

2) Accordingly, the role of the BVerfG and the CJEU differ under these frameworks. The BVerfG plays a central role in safeguarding the GG and evaluates European measures with the GG. However, the TFEU reserves this competence to the CJEU, and thereby provides the CJEU with a more prominent role.

Thus, interdependence has developed: actors may undermine one another's decisions, especially because the views of the CJEU and the BVerfG on the roles of actors differ.

This interdependence becomes especially clear from the proposal for a Regulation establishing a Common European Sales Law on the basis of article 114 TFEU. This proposal may give rise not only to complaints to the CJEU, but also to the BVerfG. If the CJEU upholds this measure, a subsequent complaint before the BVerfG will open up the possibility that the BVerfG will decide that the measure is *ultra vires*. In turn, under the TFEU, the German legislator is not competent to veto a measure under article 114 TFEU and a BVerfG decision holding that the CESL is *ultra vires* would not quash the CESL. Thus, an act would be established contrary to the GG and under European law, the German legislator and judiciary would be bound to apply it. However, it seems unlikely that German actors would in fact act in a manner contrary to the GG, and this possibility may well make private parties hesitate in adopting the CESL.

German actors have however recognised interdependence. The BVerfG has exercised restraint in its evaluations of European measures, although it has not abandoned the possibility to do so. The German legislator has recognised the need to obtain approval for measures and amendments to the Treaty – such as the European Stability Mechanism – prior to approving amendments. Possibly, if it becomes clear that the use of article 114 TFEU for a CESL is problematic under the GG as it breaches the principle of conferred powers, it is necessary to prevent that the proposal is passed at the European level.

European actors have also recognised interdependence. The European Parliament, recognising the lack of support of a CESL from national parliaments, has accordingly organised an interparliamentary meeting in which suggestions for improvement were discussed.[216] However, the debate at the European level still shows shortcomings.[217]

[216] See http://www.europarl.europa.eu/committees/en/juri/events.html?id=workshops. Notably, the desirability of a CESL as such does not seem to have been discussed.
[217] Comp. W. Doralt, 'Strukturelle Schwächen in der Europäisierung des Privatrechts', *RabelsZ* 2011, p. 260.

Thus, although actors have recognised interdependence and initiated interaction, the role of other actors in interpreted narrowly and interaction remains limited.

4.3.2.3. The role of international actors

Article 59 par 2 GG makes clear that the competence of international actors to develop binding rules dependent on the consent or cooperation of the bodies competent to legislate in that particular field. International law needs to be ratified and implemented in German law before it can become effective. Treaties that have been implemented in German law have the status of ordinary legislation, which theoretically may be altered or revoked by subsequent legislation.[218] Thus, national actors continue to play a central role.

The role of international actors is more prominent if it concerns general rules of international law, including *ius cogens* applicable without states' consent,[219] Article 25 GG stipulates that these rules are part of German law and may set aside legislation and provisions. Article 100 par. 2 GG makes clear that the BVerfG determines whether this is the case.

Importantly, the role of national actors to enter into treaties diminishes as the European legislator enters into treaties, which reallocates the competence to interpret and negotiate on these treaties partially to the European level. [220]

The role of international actors becomes smaller if the European legislator, rather than ratifying a treaty, initiates harmonisation in areas previously harmonised through treaties. Importantly, the existence of international treaties is no impediment to the competence of the EU under article 114 TFEU.[221]

Furthermore, international organisations have established model laws, legislative guides and recommendations. The extent to which these models and guides have been taken into account may also depend on the question whether European law leaves room for model laws and recommendations, for example in the case of e-commerce, where the Directive substantially differs from the UNIDROIT model law on e-commerce. In some cases, the European legislator may also take international guidelines into account. For example, according to Micklitz,[222] the OECD Guidelines on Unfair Commercial practices that reiterate the necessity to coordinate the enforcement of consumer rights in cross-border cases and its International Consumer Protection Enforcement Network (ICPEN) has served as a basis for Regulation 2006/2004 that accordingly seeks to coordinate cross-border enforcement of the *acquis*. National agencies appointed or established on the basis of this Regulation may also address matters that do not fall within the scope of the *acquis*.

These developments may well withhold national legislators from using treaties and international model laws that diverge from European measures. Conversely, if the European legislator uses a treaty or a model law as an example for European measures, this increases the role of international actors.

[218] Comp. for example Graf, Bek'scher Online-Kommentar StPO/Valerius (2012) EMRK article 1, nr 2.
[219] Maunz/Dürig, Grundgesetz-Kommentar/Herdegen, 65. Ergänzungslieferung 2012, article 25 GG, nr 1.
[220] CJEU 16 January 2003, (Cipra and Kvasnicka v Bezirkshauptmannschaft Mistelbach), C-439/01 ,[2003] ERC, p. I-745.
[221] CJEU 9 October 2001 (Netherlands v European Parliament and Council of the European Union), C-377/98, [2001], p. I-7079.
[222] MunchKomm zur ZPO/Micklitz (2008), Introduction, nr. 46.

4.3.3. Conclusion on state actors

State actors play a crucial role in the development of private law, both at the national and the European level. However, the role of actors under German constitutional law and the TFEU differs.

Whereas the GG requires that national actors continue to play a central role, especially on matters essential to the unity of the state, the TFEU has not imposed a similar limitation to the onferral of powers, nor does it confer a central role upon national actors. Thus, differently than under the traditional nation state, two state actors seek to provide a "rule of recognition" on which the validity of private law depends.[223]

As interdependence between the European legislator and the CJEU and the German legislator and courts develops, there is more need for interaction between these actors. Accordingly, the BVerfG has recognised the need to submit questions to the CJEU and the German and European legislator also interact with one another.

Howver, as actors become more dependent on one another, the divergences between the CJEU and BVerfG decisions on the role of actors increase the chance that European and national actors will undermine one another's initiatives. Moreover, as actors at both levels interpret the role of other actors narrowly, and as the quality of interaction between actors at different levels can be criticised, the chance to mitigate potential problems diminishes.

4.4. State actors and non-state actors: co-regulation

State actors have frequently developed co-regulation.[224] This paragraph will ask what role actors play in the development of alternative regulation.

Paragraph 4.4.1. will turn to the referral to self-regulation in legislation,[225] and paragraph 4.4.2. will consider the development of collective labour agreements. Paragraph 4.4.3. will end with conclusions.

In analysing the role of actors, this paragraph will indicate in what instances non-state actors have developed co-regulation, and go on to describe non-state actors' roles and the role of state actors in limiting non-state actors' roles through the development of control mechanisms.

Despite this order, it should not be overlooked that non-state actors typically develop rules within the framework of the law as established by state actors. However, the role of non-state actors and the success of these initiatives is largely dependant upon non-state actors' initiatives – without such initatives, state actors can provide all the framework they like, and they can encourage co-regulation, but to little avail.

[223] Comp. N. Jansen , R. Micheals, 'Private law and the state: Comparative perceptions and historic observations', *RabelsZ* 2006 p. 3.
[224] See previously fior a definition of co-regulation and alternative regulation par. 1...
[225] Another technique is the Inkortporation, which involves *Inkorporation* involves the inclusion of privately drafted rules into 'hard law', thereby strengthening the rol of private actors and limiting the role of state actors to control and enforce these rules. Thus, existing self-regulation enters the legislative process and becomes hard law. Augsberg 2001, p. 174-175 characterises *Inkorporation* as highly unusual, and this form will therefore not be discussed further.

4.4.1. Referral

This paragraph will consider instances of referral to private or non-democratically elected actors in legislation, what role non-state actors have played in these instances, and what role state actors have played in limiting the role of non-state actors through control mechanisms.

4.4.1.1. Instances of referral to privately drafted rules

The German legislator may refer to self-regulation in legislation ('*Verweisung*'). The legislator may either make use of *static* referral, to an entire set of self-regulation at a particular moment. *Dynamic* referral, on the contrary, does allow for changes to be taken into account. Both the German and the European legislator have made use of dynamic referral

Examples of dynamic referral at the national level are:

- Article 310 par. 1 BGB for publicly tendered building contracts ('VOB/B') drafted by various stakeholder groups and the state, exempting these clauses from judicial control.[226]

- Article 362 HGB with regard to the duties of a company on the yearly accounts ('*Rechnungslegung*').

The Ministry for Justice has contractually recognised the German Accounting Standards Committee ('*Deutsches Rechnungslegungs-Standards Committee eV*', 'DRSC') as a private committee in the sense of article 342 HGB to develop recommendations for the application of principles on the accounting standards for chains of businesses ('*Konzern*', '*concern*') in December 2011. [227] Article 342 par. 2 HGB stipulates that compliance with these standards by a chain of business entails an assumption ('*Vermutung der Richtigkeit*') that the bookkeeping of that business is in accordance with principles of good bookkeepig ('*Grundsätzen ordnungsmäßiger Buchführung*') in the meaning of article 238 HGB.[228]

- Article 161 AktG refers to the Corporate Governance Kodex that consists of three parts; one part describes positive law, the main part of the *Kodex* consists of recommendations and the last part consists of suggestions. [229] Article 161 AktG obliges businesses to make public with which recommendations in the Corporate Governance Kodex they comply and with which parts they do not comply – and why.[230]

Initially, one may get the impression that the *Kodex* is an example of co-regulation,[231] where the legislator appoints a committee, which continues to regularly check whether amendments to the *Kodex*

[226] It has however been doubted whether this exemption, if applied to consumer contracts, is in accordance with Directive 93/13. BGH 24 July 2008 - VII ZR 55/07, *BeckRS* 2008, 15864.subjected VOB/B clauses in consumer contracts to evaluation under articles 307-309 BGB as it considered that consumers had not been involved in the drafting process of the VOB/B, while the exemption was also not in accordance with the aim of articles 305 et seq BGB.
[227] Available at http://www.drsc.de/docs/drsc/standardisierungsvertrag/111202_SV_BMJ-DRSC.pdf.
[228] See further on this central concept B.P. Paal, *Rechnungslegung und DRSC*, p. 42 et seq.
[229] Deviations from the suggestions do not have to be made public or motivated. Buck-Heeb & Dieckmann 2010, p. 102, state that it has been argued that the amount of attention for the question whether the declarations in the sense of article 161 AktG has made businesses more careful of those declarations, which may undermine the effectiveness of those declarations.
[230] See for an overview of the declarations http://www.corporate-governance-code.de/ger/entsprechenserklaerung/index.html.
[231] As argued by W. Seidel, 'Der DGCK – ein private oder staatliche Regelung?', *ZIP* 2004, p. 285, who argues that the *Kodex* is not in conformity wth the GG and thus invalid. M. Heintzen, 'Der Deutsche Corporate Governance Kodex aus der Sicht des

are necessary, and which may call for meetings if it finds that this is the case, as well as the use of consultations in the drafting of the Kodex and the publication of the *Kodex* on the site of the ministry, after an evaluation of lawfulness by the ministry. However, it has been held the *Kodex* amounts to self-regulation as stakeholders themselves set rules for their behaviour,[232] and it has accordingly been introduced as such.[233]

An example of dynamic referral at the European level is:

- The role of the IASB that develops international accounting standards that, under Regulation 1606/2002, may be adopted by the European Commission in accordance with the regulatory comitology procedure set out in article 6 of the Regulation. The dynamic referral at the European level may limit the role of the DRSC.[234] In turn, joint initiatives for the closer cooperation between the Financial Accounting Standards Board ('FASB')[235] have been developed.[236]

Other forms of alternative regulation where competences to fill in the details of legislation are delegated to expert committees have been initiated at the European level. These forms are reminiscent of dynamic referral as competences to further develop rules are delegated to actors other than the legislature, including national civil servants and experts that are not non-state actors. These forms include:

- The comitology procedure involves the delegation of filling in technical details of European measures to expert committees by legislative acts that can be revoked, in accordance with article 290 TFEU.[237] The competences of these committees may vary, depending on the sort of committee distinguished in Decision 1999/468 on comitology and Regulation 182/2011, introducing a regulatory comitology with scrutiny from the European Parliament.

The Commission may, in that task, either be assisted by committees with an advisory task, composed of representatives of the Member States, or by a management committee, also composed of representatives of member States, that may submit an opinion on the draft proposed by the Commission that is however not binding, or a regulatory committee that has further competences to consider the drafts of the Commission. If the draft regulation is not disapproved by the European Parliament or Council within three months, it will be adopted.

The CJEU[238] has approved the use of comitology, requiring however that the basic elements of the matter are decided in accordance with the applicable legislative procedure, while the delegation act should be sufficiently precise. Article 40 in the Proposal for consumer rights Directive proposed

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deutschen Verfassungsrechts', *ZIP* 2004, p. 1933 also finds that the *Kodex* is non-binding state law, but in conformity with the GG.

[232] MunchKomm zum AktG/Semler (2003), article 161, nr. 29, comp. also Ringleb, 'Vorbemerkung', Ringleb et al (eds.), Deutscher Corporate Governance Kodex, 4th ed., 2010, II, nr. 14, as well as Köndgen 2006, p. 495.

[233] G. Cromme, 'Vorwort Deutscher Corporate Governance Kodex', 2002, available at http://www.corporate-governance-code.de/ger/download/DCG_vorwort_D200202.pdf.

[234] MunchKomm to AktG/Lutterman (2003), article 342 HGB, nr 70.

[235] See further http://www.fasb.org/home.

[236] See critically M. Dobler, S. Hettich, 'Geplante Änderungen der Rahmenkonzepte von IASB und FASB - Konzeption, Vergleich, Würdigung', *IRZ* 2007, p. 29.

[237] Article 291 TFEU stipulates that Member States shall implement European measures, but par. 2 provides that if uniform conditions for implementation are necessary, competence to implement legislation shall be delegated to the Commission, or to the Council. Par. 3 makes clear that the European Parliament and the council in the ordinary legislative procedure shall determine the rules and mechanisms for Member States' control to which implementation measures by the Commission are subject.

[238] CJEU 17 December 1970 (Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster and Berodt & Co), case 25-70, [1970] ECR, p. I-1161.

establishing an unfair contract terms committee, a regulatory comitology committee with scrutiny from the European Parliament.

- The Lamfalussy procedure[239] involved the development of rules in the four stage rulemaking process and non-state actors play an important role it this process.

The development of rules at four levels can be described as follows. Firstly, a broad, regulatory framework has been established in four Directives, i.e. Directive 2004/39 on markets in financial instruments, Directive 2003/6 on market abuse, Directive 2003/71 on the prospectus to be published when securities are offered to the public or admitted to trading and Directive 2004/109 on transparency requirements. At level 2, expert committees (European Banking Committee (EBC), the European Insurance and Occupational Pensions Committee (EIOPC) and the European Securities Committee (ESC), that can also act as regulatory comitology committees, design more detailed, technical implementing measures, which are subsequently adopted by the commission, which has for example resulted in Regulation 1287/2006 implementing Directive 2004/39. At level 3, expert committees (The Committee of European Banking Supervisors (CEBS), the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and the Committee of European Securities Regulators (CESR) that have since been changed, and have been replaced by the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities and Markets Authority (ESMA) composed of members of national supervisory authorities, assist the Commission in the preparation of implementation measures and help to ensure the efficient cooperation of national supervisory bodies. Level 4 concerns the enforcement of the Commission of guidelines in national law.

- The development of guidance on the implementation and application of Directive 2005/29 by the Commission.[240] This guidance is not binding and appears not to have been considered – at least not expressly – by European courts.[241]

Thus, in these forms of dynamic referral, both at the national and the European level, non-state actors play an important role and they may establish binding rules. Through referral, both German and European state actors have sought to benefit from the expertise and experience of non-state actors while also pursuing more flexible law that can be adapted more easily in accordance with the needs of legal practice.

4.4.1.2. The role of non-state actors in instances of dynamic referral

In forms of static referral, the role of non-state actors is limited as further developments fromnon-state actors are not included. Subsequent changes in self-regulation do not affect the interpretation of hard law, which has deterred legislators from using this form of referral, as it may not allow for sufficient flexibility. In cases of dynamic referral, private actors have a more prominent role, as they decide on further amendments. The role of the legislator

[239] See http://ec.europa.eu/internal_market/securities/lamfalussy/index_en.htm.
[240] SEC (2009) 1666, specifically stating that the guidance is not binding on the Commission and that, although the Guidelines aim to provide 'guidance on the key concepts and provisions of the Directive perceived to be problematic', the Guidelines have 'no formal legal status' and ultimately, the CJEU is responsible for the interpretation of the Directive.
[241] A database on this Directive has been developed, see further https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.home.show.

decreases as this actor does not decide control over these amendments: this competence has been reallocated to non-state actors.[242]

Yet for both forms of referral, the decision to refer to self-regulation is left to the legislator, while referral eventually serves to strengthen legislation. However, the choice for referral simultaneously makes clear that state actors need to make use of non-state actors with more expertise and experience that can moreover not easily be reversed. Thus, in order to provide rules that take into account the needs of practice, cooperation with non-state actors becomes necessary. The attractiveness of this option for state actors should not be underestimated. Especially at the European level, the need to enhance the efficiency of decision-making and make very lengthy legislative procedures in rapdily developing fields has been emphasised.[243] Smultaneously, however, this may result in initiatives where European actors seek to circumvent the constraints of the legislative process.[244]

The German legislator has similarly recognised the need to refer to privately drafted rules, but German actors have emphasised that dynamic referral, and thereby the role of non-state actors, is limited, as private rules merely entail crystallising an ambiguous rule or concept,[245] in which cases dynamic referral is allowed.[246]

4.4.1.3. The development of control mechanisms

The ability of non-state actors to establish binding rules may give rise to *Fremdbestimmung*, which is a problem for German actors,[247] whereas European actors may not necessarily see *Fremdbestimmung* as a problem. However, state actors do need to retain some control over the development of alternative regulation. Consequently, have state actors sought to limit the role of non-state actors?

Problems of *Fremdbestimmung* arising from rules developed by the DRSC have prompted the development of control mechanisms. Accordingly, the contract between the Ministry and the DRSC stipulates, among other things, the independence of the DRSC and the need for transparency in its decision-making. Moreover, in accordance with the need for participation of relevant stakeholders recognised in article 342 par. 1 HGB, the DRSC and its committees initiate consultations on drafts for standards.[248] Furthermore, the effect of the recommendations is subject to subsequent approval and publication by the Ministry.

Similarly, the Ministry exercises control over the corporate governance *Kodex* as it appoints the committe drafting and amending the Kodex and as it subjects the *Kodex* to an evaluation of lawfulness before publishing it on the Ministry website.

The involvement of European state actors has been emphasised as an important mechanism to retain some control over alternative regulation. Accordingly, the role of the

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[242] Augsberg 2001, p. 176 stresses that referring to a privately drafted rule does not mean that this rule subsequently becomes hard law, and does not have a similar effect to hard law; rather, its content may merely be relevant for the interpretation of a legislative provision.
[243] COM (91) 521 final.
[244] H. Collins, *The European Civil Code. The Way Forward*, Cambride: Cambridge University Press 2008, p. 87.
[245] Accordingly, Buck-Heeb & Dieckmann 2010, p. 123 argue that theoretically, the DRSC does not directly establish binding rules; it merely provides a more precise interpretation of existing principles of good bookkeeping that have also been characterised as customary law.
[246] Augsberg 2001, p. 178.
[247] Comp. R. Köningsgruber, 'IASB und FASB zwischen Autonomie und Eingebunden-Sein', *IRZ* 2008, p. 245, who has noted that the reliance on private actors obliges private actors to justify the development of rules, but at times, it may also give private actors a possibility to limit the development of rules without sufficient justification. Also critically on the role of the IASB for example MunchKomm zum StGB/Sorgenfrei (2010), introduction to articles 331 et seq HGB, nr 35Comp. on the comitology procedure. K.U. Schmolke, 'Die Einbeziehung des Komitologieverfahrens in den Lamfalussy-Prozess - Zur Forderung des Europäischen Parlaments nach mehr Entscheidungsteilhabe', *EuR* 2006, p. 439-440 and specifically on the Lamfalussy procedure M. Rötting, C. Lang, 'Das Lamfalussy-Verfahren im Umfeld der Neuordnung der europäischen Finanzaufsichtsstrukturen', *EuZW* 2012, p. 12, 13.
[248] See further http://www.drsc.de/service/ueber_uns/arbeitsweise/index.php.

IASB is subject to approval from the European Commission assisted by a regulatory comitology committee, while the European Parliament may also be involved. Similarly, recent changes have provided the European Parliament to participate in comitology procedures in article 5a Decision 1999/468/EC. Also, the use of comitology has been limited to "technical matters". Yet the proposal for a comitology committee in the proposal for a Directive on consumer rights and subsequent German resistance[249] show that European and national views on what matters are "technical matters" may well diverge.

European limitations may detrimentally affect private law as it may lead to detailed measures that limits the flexibility of alternative regulation.[250] Nevertheless, these limitations seem rather mild compared to German limitations.

4.4.1.4. Comparison

Both German and European state actors have facilitated the development of co-regulation in the form of referral and collective labour agreements. Interestingly, both the European and the German legislator have made use of dynamic referral, despite German constitutional objections. Yet the role of state actors and non-state actors differ at the European and the national level. Especially the limitations on the role of non-state actors through the development of control mechanisms has, logically, been less developed at the European level, as the development of these mechanisms has not consistently been based on concerns over *Fremdbestimmung*. These different roles of actors may lead to problems from a German perspective, as non-state actors enjoy considerable discretion under European law that elads to *Fremdbestimmung*, for which German actors cannot compensate.

However, that does not mean that European procedures should be subject to national standards. This conclusion would overlook the distinction of the BVerfG between national and transnational democratic procedures.[251] Accordingly, Joerges, Schepel and Vos[252] rejected focussing on the lack of democratic legitimacy of private standard-setting, pointing out that private standard setting 'draw from a pool of relevant knowledge and expertise that lawmakers can only dream of'. They argued that for an approach that would make private standard-setting more publicly accountable, and argued for 'deliberative supranationalism' that involves redesigning rulemaking processes so that rules developed in rulemaking processes derive their legitimacy from the debate in which they have been developed. Thus, the emphasis of Joerges, Schepel and Vos is not on inclusiveness and representation but on 'participation', which is reminiscent of the BVerfG distinction in its Lisbon judgment, while, moreover, the quality of interaction between a limited number of actors is stressed.

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[249] See the response of the Bundesministerium der Justiz to COM (2006) 744 final, http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/responses/ms_bundesministerium.pdf, p. 17-18.

[250] K.U. Schmolke, 'Die Einbeziehung des Komitologieverfahrens in den Lamfalussy-Prozess - Zur Forderung des Europäischen Parlaments nach mehr Entscheidungsteilhabe', *EuR* 2006, p. 446-447 traces the level of detail to the increased participation of stakeholders, the European Parliament, and the need for political compromise.

[251] Similarly, K.U. Schmolke, 'Die Einbeziehung des Komitologieverfahrens in den Lamfalussy-Prozess - Zur Forderung des Europäischen Parlaments nach mehr Entscheidungsteilhabe', *EuR* 2006, p.443-444 has criticised the emphasis on European democratic procedures that are modelled after national democracies, noting that democratic control is useful especially in controversial matters where politically organised minorities can influence majority decision-making. At the European level, Parliament cannot similarly be divided in politically organised minorities, and the decision-making at the European level also receives much less attention than national decision-making.

[252] Ch. Joerges, H. Schepel, E. Vos*, The problems with the involvement of non governmental actors in Europe's legislating process*, EUI/LAW 1999, p. 25-27, 50-53, 58-59.

4.4.2. Collective agreements

Collective labour agreements are an important technique in the development of employment contract law. This paragraph will firstly consider the use of TV's and the European social dialogue and secondly what role non-state actors play in these forms, and what role state actors have played in imposing limitations on the role of non-state actors through the development of control mechanisms.

4.4.2.1. *Tarifverträge* ('TV's'), *Betriebsvereinbarungen* ('BV's') and framework agreements

This paragraph will respectively describe the use of TV's, BV's, and framework agreements in the European social dialogue.

- The development of TV's

The use of TV's is stipulated by the *Tarifvertragsgesetz* ('TVG'). Article 1 TVG makes clear that TV's establish rules for entering into labour contracts, the rights and duties in those contracts, and the termination of labour contracts (these rules are characterised as '*Arbeitsverhältnisormen*') as well as rules with regard to the company and its statutes ('*Betriebsnormen*').[253] Article 2 establishes that contract parties are unions, employers, and employers' organisations. A TV should not be too ambiguous, and the parties may not leave it to the judge to decide parties' legal positions under a TV, but it may have limited retroactive effect, taking into account the justified expectations of parties subject to the TVG.[254] The *Arbeitsverhältnisnormen* in TV's are binding on contract parties and their members, which means that the TV does not have to be incorporated into individual contracts. The principle of the rule of law ('*Rechtsstaat*') entails that unions should be democratically elected, especially as the decisions of unions and employers' organisations affect members' constitutional rights, and possibly third parties rights if TV's are declared generally binding.[255] *Betriebsnormen* under article 3 par. 2 TVG have binding effect on the employees of businesses that are party to the TV. *Betriebsnormen* concern provisions that realistically have to be applied uniformly, for example throughout a company, which justifies its effects on third parties, as it would be ineffective to conclude these rules in individual contracts.[256] According to article 4 TVG, individual contracts cannot set aside the rules in the TV, unless those contracts confer more rights on the employee or if the TV allows for deviations (the '*Günstigkeitsprinzip*'). Article 5 TVG establishes that TV's can be declared generally binding.

TV's must be in accordance with supranational laws, the GG, state constitutions, federal and state legislation, as well as official decisions ('*Verordnung'*, '*AMvB*') and the statutes of public corporations.[257] Mandatory provisions, which also include general principles underlying labour law and private law – such as the principle of good faith ('*Treu and Glauben*')[258] – can be distinguished in 'mutually mandatory provisions ('*zweiseitig zwingend*') from which neither party can diverge, and partially mandatory ('*einseitig zwingend*') from which one party, usually to the advantage of the weaker party, may diverge. Moreover, some mandatory provisions in the BGB, as well as other laws are '*Tarifdispositives Gesetzesrecht*', which refers to mandatory rules that individual contracts or BV's may not diverge from to the detriment of the employees, but where parties to a TV may diverge from, as it is assumed that TV's are negotiated between parties with an equal bargaining position.[259] Similarly,

[253] See for a definition BAG 17 June 1997, *NZA* 1998, 213, par. B 1 a.
[254] BAG 23 November 1994, AP TVG 1 Rückwirkung Nr. 12.
[255] Kommentar zum TVG/Wiedenmann (2007), introduction, nr 334-335.
[256] BAG 26.04.1990 - 1 ABR 84/87, AP GG Art. 9 Nr. 57, par. B V 2b.
[257] Kommentar zum TVG/Wiedenmann (2007), nr 350.
[258] Kommentar zum TVG/Wiedenmann (2007), nr, 350, 355.
[259] Erfurter Kommentar zum Arbeitsrecht/Preis (2012), article 611, nr 207.

case law (‘*Tarifdispositives Richterrecht*’) also leaves room for parties to TV’s, but not for parties to BV’s or individual contracts, to negotiate.[260]

- The development of BV’s

The use of BV’s is stipulated by the *Betriebsverfassungsgesetz* (‘BetrVG’). Work councils (‘*Betriebsrates*’) may negotiate collectively with the employer on BV’s within a company. It has been held that BV’s are limited to general rules, instead of specific, individual rules,[261] with the exception of clauses on vacation and employee accommodation, in accordance with article 87 pars. 5 and 9 BetrVG.[262] Some essential clauses are reserved to individual contracts.[263] BV’s are modelled on TV’s, although they have a different basis.[264] Importantly, the BAG has held that the *Betriebsrat* is assumed to be dependant of the employer and thus in an unequal position, which entails a judicial control of BV’s.[265]

Article 77 par 4 BetrVG establishes that provisions in BV’s that meet the requirements of article 77 par. 2 BetrVG have direct mandatory effect for all the employees in a company entering into a BV’s, without having to be included in individual employment contracts.[266] A central issue in the debate on BV’s is the problem of *Fremdbestimmung* if private parties establish binding rules for employees, which are moreover not always to their benefit.[267] It has been questioned whether the binding effect of BV’s can in addition be justified on another basis. Notably, BV’s are not negotiated by unions, but by the works councils, and the role of the work councils in establishing rules with binding effect can thus not be justified on the basis of a previous membership.[268] Alternatively, it has been held that the legitimation for the binding effect can be traced to the employment contract, as well as the democratic election of the works council in accordance with article 7 BetrVG. Thus, one may ask whether the competence of the council to enter into these agreements could also be characterised in terms of agency.[269] Waltermann[270] has convincingly argued that neither the contract for employment nor the possibility to elect members of the *Betriebsrat* can be seen as a sole basis for the competence of the *Betriebsrat*.

Although article 77 par. 3 BetrVG bars additional BV’s, notwithstanding the *Günstigkeitsprinzip* in article 4 par. 3 TVG, [271] which has also been accepted for BV’s,[272] parties to a TV may allow for complementary or even diverging BV’s.[273] If parties have not (expressly) allowed for additional BV’s, the question whether a BV is allowed depends on the question whether the TV seeks to provide an exhaustive arrangement of parties’ rights and duties on a particular subject.[274] In the light of these considerations, it can be doubted whether it is possible to extend the effect of TV’s to non-member employees through additional BV’s, thus extending these agreements to parties who may not have had a chance to influence these agreements, increasing the chance of *Fremdbestimmung*.[275]

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[260] Kommentar zum TVG/Wiedenmann (2007), introduction, nr 400 et seq.
[261] See critically Kommentar BetrVG/Richardi (2012), article 77, nr 95, as well as Waltermann 1996, p. 239-241.
[262] Erefurter Kommentar zum Arbeitsrecht/Kania (2012), article 87 nr 6.
[263] Kommentar BetrVG/Richardi (2012), article 77, nr 72, 86.
[264] See criticially Kommentar BetrVG/Richardi (2012), article 77 nr 26-27, 69-70.
[265] See already BAG 30.1.1970, *NJW* 1970, 1620, par. B IV 3 b.
[266] Buck-Heeb & Dieckmann 2010, p. 204. Kommentar BetrVG/Richardi (2012), article 77, nr 296 argues that invalid BV’s that are blocked by a TV in accordance with article 77 par 3 BetrVG may become part of individual contracts.
[267] See for an overview on the extensive literature that this question has generated W. Linsenmaier, ‘Normsetzung der Betriebsparteien und Individualrechte der Arbeitnehmer’, *RdA* 2008, p. 2.
[268] H. Wiedemann, Festschrift für Thomas Dieterich, p. 680.
[269] See for example P. Kreutz, *Grenzen der Betriebsautonomie*, Beck: München 1979, p. 171-172.
[270] R. Waltermann, *Rechtsetzung durch Betriebsvereinbarung zwischen Privatautonomie und Tarifautonomie*, Mohr: Tübingen 1996, p. 86 et seq, p. 205-206. Linsenmaier 2008, p. 6 points out that there is no contractual basis for the agency between members of the works council and individual employees.
[271] Kommentar BetrVG/Richardi (2012), article 77, nr 241, Kommentar zum TVG/Wank (2007), article 5, nr 549.
[272] See for example BAG 07.11.1989 - GS 3/85, AP BetrVG 1972 § 77 Nr. 46, par. C II 1.
[273]BAG 18.08.1987 - 1 ABR 30/86, NZA 1987, 779 par. II 3.
[274] BAG 17.12.1985 - 1 ABR 6/84, AP BetrVG 1972 § 87 Tarifvorrang Nr. 5, in par. B II 3. See critically W. Däubler, ‘Gewerkschaften und Betriebsraten’, in: *FS Wlotzke*, p. 273.
[275] See against this possibility Kommentar BetrVG/Richardi (2012), article 77, nr 289-290.

- The development of framework agreements[276]

At the European level, the social dialogue finds it basis in article 155 TFEU, and is considered as an important manner to stimulate innovation and growth, as well as 'better governance' in the sense that the dialogue may support the responsiveness of European measures.[277] It has been argued that article 155 TFEU merely sets a policy aim and cannot serve as a legal basis for European collective labour agreements.[278] European social dialogue may result in framework agreements have been considered as an alternative to harmonisation in social policy areas. Notably, a framework agreement under article 155 TFEU can either be implemented in accordance with Member States practices, or it can, at the request of signatory parties, result in a Council Decision that is binding on the parties to whom it is addressed. Accordingly, the European Union Trade Confederation, in negotiation with the European Industry Federations, has established framework agreements on parental leave, part-time work and fixed-term contracts. Further sectoral agreements at a European level have also been established within this framework.[279]

Smismans[280] points out that so far, a refusal to enforce a framework agreement has not taken place. Notably, if the Commission does not accept the framework decision, an alternative agreement is not likely to be reached, and possible refusal or amendments may moreover be a disincentive for parties negotiating on framework agreements. The question may arise whether provisions in such a Council Decision, as European law, would aside national mandatory law aiming to protect employees.

Article 153 par. 5 makes clear that framework agreements cannot concern the right to pay, the right to strike, the right to association or possible lock-outs. Also, framework agreements do not impose binding norms directly on their members' members – as individual employers and employees are not members of the parties negotiating framework agreements at the European level.

The European legislator has moreover provided rules for European works councils or a procedure for Community-scale undertakings. This Directive aimed to provide rules for cross-border situation, reforming and repealing Directive 94/45, the application of which was problematic.[281] The Directive further aims at stimulating cross-border dialogue and accordingly consulted management and labour organisations in the reform of the 1994 Directive. As Müller and Platzer[282] point out, the model of collective negotiations combined with works councils is reminiscent of both the German and the Dutch legal orders.

4.4.2.2. The role of non-state actors

What role do actors play in collective labour agreements at the national and European level?

Firstly, the role of non-state actors falls within the scope of article 9 par 3 GG.[283] The BAG[284] has held that the competence has been delegated from the state to unions and employers' organisations, which seems however difficult to reconcile with article 9 par. 3 GG.[285]

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[276] At the European level, moreover, European Works councils have been established under Directive 2009/38, but these councils do nto have the right to bargain collectively.
[277] COM (2002) 341 final.
[278] Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union/Benecke (48. Ergänzungslieferung 2012), article 155, nr 4.
[279] See http://www.etuc.org/r/2.
[280] S. Smismans, 'European social dialogue in the shadow of hierarchy', *Journal of Public Policy* 2008, p. 169.
[281] COM (2008) 419 final, p.
[282] T. Müller, H.-W. Platzer, 'European works councils', in: B. Keller, H.-W. Platzer (eds.), *Industrial relations and European integration,* Ashgate: Hampshire 2003, p. 58.
[283] BVerfG 18 November 1954, *NJW* 1954, 1881, par. A, and B, 2 b, BVerfG 24 May 1977, *NJW* 1977, 2255, par. B II 1 a. A. Söllner, 'Grenzen des Tarifvertrags', *NZA* 1996, p. 902 points out that the development of TV's is not seen against the background of private autonomy nor the freedom of association, as the TV is not an individual contract with binding effect just for contract parties, but for third parties
[284] BAG 15 January 1955, *NJW* 1955, 684, at 687.
[285] R. Waltermann, *Rechtsetzung durch Betriebsvereinbarung zwischen Privatautonomie und Tarifautonomie*, Mohr: Tübingen 1996, p. 122 et seq notes that this theory can be traced to the more general idea of a monopoly for the state to establish *Rechtsnormen*.

Arguably, the question whether the competence of unions can be derived from constitutional rights may affect one's reasoning – it may for example have consequences for the scope of the competence of parties to alternative regulation: if parties exercise a constitutional right, this implies a broader competence than the exercise of a competence delegated by the state.[286]

Regardless, the exercise of this right justifies a prominent role for private parties to develop binding rules that are not subsequently subject to democratic debate,[287] which has been democratically sanctioned in the TVG. The role of non-state actors is however limited as the exercise of private parties' constitutional rights does not justify *Fremdbestimmung*. If employees and employers subject themselves to rules developed in TVG's through their membership of a union or employers' organisation, this will generally not be the case. This competence is reserved to the Minister who may declare TV's generally binding, which may lead to *Fremdbestimmung*.

Secondly, the role of non-state actors developing BV's is less prominent as the right to negotiate on BV's is not a constitutional right. The legislator is not constitutionally bound to prioritise TV's over BV's, but this priority follows from the better legitimation of TV's over BV's.[288] Generally, BV's are considered to be more prone to *Fremdbestimmung* as BV's are negotiated by works councils and although these councils are democratically elected, employees cannot choose whether they will subject to the rules negotiated by the council.[289] The role of actors involved in the development of BV's is subject to more limitations, which has however not prevented that BV's play an increasingly important role, also recognised by negotiating parties to TV's leaving room for additional BV's. The question on what matters BV's may be established is controversial,[290] and has given rise to the development of two competing theories, the *Vorrangtheorie*, followed by the BAG, and the *Zwei-Schranken-Theorie* that argues that the reservation in article 77 par. 3 BetrVG includes matters addressed by article 87 par. 1 BetrVG.[291]

The BAG has held that, within the limits of article 77 par. 3 TVG, every matter addressed by article 1 TVG can be subject of a BV.[292] Thus, article 77 par. 3 BetrVG has been interpreted *a contrario* –if competences are not reserved to TV's, they can be dealt with through BV's. Notably, this is an extensive interpretation of parties' competence and one may ask how this interpretation sits with the question of *Fremdbestimmung* by parties to a BV.[293]

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[286] This Kommentar zum TVG/Wiedemann (2007) article 1 nr 54, similarly Bachmann, *Private Ordnung*, p. 127.
[287] H. Wiedemann, 'Normsetzung durch Vertrag', in: P. Hanau, F. Heither, J. Kühling (eds.), *Festschrift für Thomas Dieterich zum 65. Geburtstag*, Beck: München 1999, p. 663.
[288] BVerfG 1 March 1979, *NJW* 1979, 699, par. C III 2 a.
[289] BAG 12.12.2006, AP BetrVG 1972 § 77 Nr. 94, par. 21, 24, 25 has however held that the role of the democratically elected works councils safeguards that the interests of employees are taken into account, and are not compromised unfairly.
[290] See for example Kommentar BetrVG/Richardi (2012), article 77, nr 66-67, with an overview of recent case law and literature.
[291] See for example R. Waltermann, *Rechtsetzung durch Betriebsvereinbarung zwischen Privatautonomie und Tarifautonomie*, p. 285 et seq.
[292] See already BAG v. 16 March 1956, *NJW* 1956, 1086, par. I. 1. BAG AP BetrVG 1972 § 77 Nr. 21 (also available under *NZA* 1987, 639), par. B 4 bb**,** confirmed in BAG AP BetrVG 1972 § 87 Lohngestaltung Nr. 51, par. C I 4. These decision have been extensively motivated because of the controversy on this question and the following reasons can be deduced from these cases: Firstly, if article 77 par. 3 BetrVG would exclude BV's in issues addressed by article 87 par. 1 BetrVG, it would, according to the BAG, simultaneously exclude codetermination. Secondly, if no TV has been established, even though that is customary in the sense of article 77 par. 3 BetrVG, it is undesirable that article 77 par. 3 BetrVG would also block rights to codetermination, realised through BV's, which would leave employees without the protection of either a TV or a BV. Thirdly, the BAG points to the importance of the protection of employees, stating that if, in accordance with article 87 par. 1 BetrVG an issue is already stipulated by law or by TV, the possibility of the employer to decide independently on these issues will typically be limited and thus, the aim of mandatory codetermination – to limit the power of the employer – will already have been achieved. Somewhat confusingly, in contrast, the reasoning of the BAG in par. B 4 cc emphasises that the possibility of voluntary BV's in the absence of codetermination rights (in accordance with article 88 BetrVG) shows that codetermination rights should not be equated with BV's and that conversely, the reservation in article 77 par. 3 BetrVG with regard to BV's should not be equated with codetermination rights.
[293] Alternatively, it has been argued that the competence of *Betriebsrate* should be based on article 88 BetrVG, see for example Erfurter Kommentar zum BetrVG/Kania (2012), article 77, nr 36.

Thus, *Betriebsrate* and employers may establish a BV regardless of the existence of a TV. However, if there is no codetermination for the *Betriebsrat*, because a particular issue is left to voluntary BV's under article 88 BetrVG, TV's will have precedence.[294]

Thirdly, at the European level, the role of non-state actors is less prominent as constitutional rights do not play a similar role at the European level, although article 152 TFEU stipulates that the Union recognises the roles of social partners at the European level. However, the Commission has taken a top-down approach to the role of unions and employers' organisations, and exercises control over which non-state actors are involved in the development of framework agreements.[295] However, within the framework set by the Commission, parties are free to negotiate,[296] and once parties have agreed, this agreement cannot be modified. European law may moreover limit the role of national unions as the role of national unions has been subject to restrictions of free movement law. [297]

4.4.2.3. The development of control mechanisms

Both at the European and at the national level, state actors have imposed limits on the role of non-state actors to develop rules that may become binding on third parties. At the national level, the possibility that private actors may impose binding rules on third parties has led to the development of control mechanisms.

TV's are generally not subjected to judicial evaluation as TV's are established to the mutual benefit of both employer and employees and accordingly fall within the *Richtigkeitsgewähr*. [298]. This is also recognised in article 310 par. 4 BGB that excepts TV's from judicial control under articles 305-310 BGB.[299] This exception gives private parties discretion with regard to the content of TV's, within the scope of mandatory laws.

Yet *Fremdbestimmung* can arise when TV's are declared generally binding, a competence that is however reserved to state actors. Nevertheless, possible *Fremdbestimmung* remains, which has led to the development of various mechanisms to ensure that the declaration does not result in declaring the TV of a limited number of stakeholders binding, irrespective of legitimate interests of others. These compensating mechanisms include:

1) It is only possible to declare TV's, or parts of TV's, generally binding when the public interest so requires.[300] The Ministry may not suffice by merely sanctioning a TV, and a TV may not be declared generally binding because it is in the interest of the parties to a TV.

2) Article 5 par. 2 TVG stipulates that the interests of employees who are not members of a union and who have not had the opportunity to influence the TV should be taken

[294] Erfurter Kommentar zu Arbeitsrecht/Kania (2012), article 77 nr 53.
[295] COM (93) 600 final and COM (1998) 322 final.
[296] CIOM (93) 600 final, par. 31.
[297] CJEU 11 December 2007 (International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti), C-438/05, [2007] ECR, p. I-10779, CJEU 18 december 2007 (Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet), C-341/05, [2007] ECR, p. I-11767.
[298] W. Schmidt-Rimpler, in: *Festschrift für Ludwig Raiser*, p. 13 has denied that TV's fall within the scope of the *Richtigkeitsgewähr*, as doubts with regard to the negative *Richtigkeitsgewähr* may arise.
[299] Buck-Heeb & Dieckmann 2010, p. 202.
[300] For example when non-bound employers seek to profit from not entering into a TV by offering lower salaries and benefits, which may undermine the positions of employers having entered into a TV. This problem may be increased by Europeanisation. Comp. K.-S. Hohenstatt, N. Schramm, Tarifliche Mindestlöhne: Ihre Wirkungsweise und ihre Vermeidung am Beispiel des Tarifvertrags zum Post-Mindestlohn, *NZA* 2008, p. 435.

into account in deciding whether to declare a TV generally binding or not, in accordance with the principle of democracy.[301]

3) Unbound employees and employers subject to a generally binding TV may challenge the declaration before the court.[302]

4) Parties to a TV who do not agree with the declaration – or the lack thereof – of their own TV or "competing" TV's may in addition turn to administrative courts, in accordance with article 40 *Verwaltungsgerichtsordnung*.[303]

5) Parties'negotiating room has been limited by mandatory law.

The first four safeguards provide third parties with a possibility to influence rules that may be imposed upon them, thus limiting the role of negotiating parties to a TV as well as the discretion of the Ministry to declare TV's generally binding. Unfortunetaly, however, the possibility for parties to resist or challenge declarations under article 5 TVG has contributed to the decreasing use of these declarations.[304] As an alternative, the legislator has created the possibility to issue a *Verordnung* in the sense of article 80 GG in specific cases, [305] instead of a declaration, thus limiting the possibility of parties to veto declarations in the sense of article 5 TVG.

The role of parties to a BV is subject to further-going limitationsin the form of judicial control as these agreements do not fall within the scope of the *Richtigkeitsgewähr*.[306] The BAG[307] has emphasised that the agreements entered into by the *Betriebsrat* must meet requirements of proportionality, stating that the judicial control on BV's is stricter than TV's because, firstly, TV's are the result of the practice of a constitutionally protected right, and secondly, the binding effect of TV's is legitimised with preceding membership.[308] Richardi[309] states that the judicial control does not entail a control of the *content* of BV's and courts may not 'repair' these agreements. Instead, courts evaluate whether parties to a BV have acted in accordance with the limits imposed by higher laws and TV's. In some cases, BV's have been subjected to judicial control,[310] despite article 310 par. 4 BGB that exempts BV's from judicial evaluation.

The role of non-state actors at the European level is also subject to limitations. Notably, the European Commission plays a central role in the selection of actors participating in the development of framework agreements, in accordance with the guidelines provided by

[301] E. Stalhacke, 'Die Allgemeinverbindlicherklärung von Tarifverträgen über das Arbeitszeitende im Verkauf', *NZA* 1988, p. 346.
[302] Kommentar zum TVG Löwisch/Rieble (2004), article 5 nr 141.
[303] BverwG 3.11.1988 - 7 C 115/86, *NJW* 1989, 1495.
[304] F.J. Düwell, 'Die gerichtliche Überprüfung der Allgemeinverbindlicherklärung von Tarifverträgen', *NZA-Beilage* 2011, p. 80. Kommentar zum TVG/Wank (2007) article 5, nr 10-11 holds that the generally binding TV's continue to play an important role in some branches in particular.
[305] See for example article 7 *Arbeitnehmer-Entsendegesetz*.
[306] See already BAG 30.1.1970, *NJW* 1970, 1620, par. B IV 3 b. See critically H. Wiedemann, in: *Festschrift für Thomas Dieterich*, p. 682, stating that the correctness of this assumption can just as well be doubted as the assumption of equality between parties to a TV.
[307] BAG 12.12.2006, AP BetrVG 1972 § 77 Nr. 94, par. 21, 24, 25.
[308] Accordingly, R. Richardi, *Kollektivgewalt und Individualwille bei der Gestaltung des Arbeitsverhältnisses*, Beck: München 1968, p. 313-314 qualifies the BV as '*Zwangsordnung*', a non-voluntary order.
[309] BetrVG/Richardi (2012) article 77 nr 124.
[310] It is not clear whether BV's can be subjected to a test of good faith. On the one hand, the reference to '*Recht und Billigkeit*' in article 75 par 1 BetrVG may be interpreted as an indication that there should be a test. On the other hand, article 310 par 4 BGB has exempted BV's from the test usually applied to STC's.

the Commission.[311] However, the CJEU exercises little further control with regard to the requirement of respresentativeness: [312]

> It is proper to stress the importance of the obligation incumbent on the Commission and the Council to verify the representativity of the signatories to [a framework agreement] (…) The participation of the two institutions in question has the effect (…) of endowing an agreement between management and labour with a Community foundation of a legislative character, without recourse to the classic procedures provided for under the Treaty for the preparation of legislation, which entail the participation of the European Parliament. As case-law makes clear, the participation of that institution in the Community legislative procedure reflects at Community level the fundamental democratic principle that people must share in the exercise of power through a representative assembly (….) the principle of democracy on which the Union is founded, requires – in the absence of the participation of the European Parliament in the legislative process – that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council'

This test is a limited one, focussing on the assessment of the Council and the Commission. The Court does not question the criteria of representativeness established by the Commission and Council. [313] Thus, this restraint provides actors that have been selected to participate in the development of framework agreements a wide range of discretion that ius subject to little additional controls.

4.4.2.4. Comparison

Thus, the role of state actors and non-state actors diverges at the European and the national level. Even though the right of parties to bargain collectively has been recognised at the European level, and the development of framework agreements falls within this right, the role of non-state actors is simultaneously larger and smaller: if non-state actors participate in the development of framework agreements, their role will be considerably more influentual than the role of parties involved in TV's and BV's that are subject to much more control mechanisms. Simultaneously, more collective agreements have been developed at the national level, but the role of these actors is subject to more limitations, whereas the role of non-state actors not participating in the development of TV's is potentially more prominent.

Thus, German actors are less able to prevent *Fremdbestimmung* resulting from framework agreements. This may be oproblematic from a national perspective. Accordingly, Whittaker[314] notes that collective contracts that are not in accordance with the individual notion of freedom of contract are likely to meet with resistance from national lawyers that find that the rights of weaker parties are limited through collectively bargained contracts, which in the UAPME decision has clearly been the case.

4.4.3. Conclusion on state actors and non-state actors

State actors have enabled non-state actors to develop rules that have subsequently been reinforced by state actors. Simultaneously, both German and European state actors have

[311] COM (93) 600 final and COM (1998) 322 final.
[312] CJEU 17 June 1998 (UEAPME v Council of the European Union), T-135/96, ECR [1998], p. II-2335, par. 88-89.
[313] Critically K. Armstrong, 'Rediscovering civil society: The European Union and the White Paper on Governance', *ELJ* 2002, p. 125-126 as well as Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union/Benecke (48. Ergänzungslieferung 2012), article 154, nr 10.
[314] S. Whittaker, 'On the development of European standard contract terms', *ERCL* 2006, p. 74.

imposed limits on the role of non-state actors through the development of control mechanisms. German actors have developed a wide range of control mechanisms, often used in combination with one another: control of the substance of co-regulation such as the *Kodex*, TV's to be declared generally binding, and the judicial control over BV's; the appointment or control over actors developing co-regulation, such as the DRSC and the *Kodex*, the organisation of extensive decision-making processes, visible in the development of the *Kodex* and the DRSC, and the development of mandatory law, for TV's and BV's.

The European legislator has sought to limit the role of non-state actors through much less varied control mechanisms: by imposing restraints on comitology and by participation of state actors in the development of co-regulation. The European legislator does not consider the organisation of extensive drafting processes as a way to compensate for *Fremdbestimmung*, if only because of the potential length of such procedures if all representative and interested parties are involved. Quite the opposite view is apparent: the decision-making processes preceding European co-regulation in some cases are the opposite of open and inclusive. Control over the substance of co-regulation is equally problematic considering the difficulties of parties at the European level to reach consensus.

Differences have become apparent between the limitations of non-state actors' roles at the European and the national level. Because of these difference, interdependence between European and German actors becomes visible. On the one hand, German actors are less able to determine the role of non-state actors. As fewer restrictions have been imposed on the role of non-state actors at the European level, potentially, more *Fremdbestimmung* may develop that German state actors cannot compensate. Importantly, potential *Fremdbestimmung* may provoke resistance against the development of co-regulation developed at the European level.

Interdependence, however, may also be the cause for for the increasing visibility of the role of non-state actors. Particularly, national and especially European state actors increasingly depend on the expertise of non-state actors.

4.5. Non-state actors

This paragraph will ask what role non-state actors actors play in the development of private law.

Non-state actors, including private parties, form a diverse group, who are generally not competent to establish binding rules. Instead, they may create rules through self-regulation.[315]

Generally, the success of self-regulation varies,[316] and it is still considered critically, also in cases where successful self-regulation has been established: [317]

> 'Deutlich wird (...) das die Selbstregulierung unter dauerndem Erfolgsdruck steht. Darbei gilt es darzutun, dass die schneller, beweglicher und wirksamer ist al seine gesetzliche Lösung. Schieβlich wird die Praxis der Selbstregulierung sehr viel intensiever und argwöhnischer beobachtet al seine gesetzliche Regelung, so dass jeder Fall, bei dem sich Mängel des

[315] It has been established previously that this research defines self-regulation as the making of rules and norms by both by contract parties or a group of persons or bodies binding contract parties or this group, including other private actors that choose to be bound by the rules made through self-regulation, see previously par 1.1.
[316] See for an overview Buck-Heeb & Dieckmann 2010, p. 2.
[317] M. Schmidhuber, *Verhaltenskodizes im nationalen und grenzüberschreitenden elektronischen Geschäftsverkehr, Zur Frage der Integration der Selbstregulierung durch Private in die staatliche Rechtsordnung*, Lang: 2004, p. 23, 44.

> Systems zeigen, sofort als Beweis für das Versagen von Selbstregulierung herangezogen wird.'[318]

However, increasing the chance of successful self-regulation by enabling private actors to establish binding rules meets with problems of *Fremdbestimmung*.

Notably, the German legal order distinguishes between contractual self-regulation, discussed in paragraph 4.5.1. Instances of contractual self-regulation need to be considered in the light of the *Richtigkeitsgewähr*, which considers the extent to which parties realise their own aims in accordance with private autonomy and article 2 GG, and upholds or limits the effect of contracts accordingly. Other forms of self-regulation are the drafting of rules by organisations which can be enforced on the basis of the articles of association ('*Satzung*', '*statuten*') of those organisations, analysed in paragraph 4.5.2., and self-regulation established by non-binding one-sided juridical acts, considered in paragraph 4.5.3. Paragraph 4.5.4. will end with a conclusion.

4.5.1. Contractual self-regulation

Paragraph 4.5.1.1. will consider the idea of the *Richtigkeitsgewähr* and the effect of individual contracts. Paragraph 4.5.1.2. will discuss collectively negotiated contracts. Paragraph 4.5.1.3. will turn to model contracts and paragraph 4.5.1.4. will discuss STC's. Paragraph 4.5.1.5. will end with a conclusion.

In discussing the instances of self-regulation and the roles of actors, the paragraph will look at the role of non-state actors that becomes apparent from these instances, the role of state actors in the reinforcement of self-regulation, and the subsequent role of state actors in the limitation of non-state actors roles.

Despite this order, it should not be overlooked that non-state actors typically develop self-regulation within the framework of the law as established by state actors. However, the role of non-state actors and the success of these initiatives is largely dependant upon non-state actors initiatives – without such initatives, state actors can provide all the framework they like, and they can encourage self-regulation, but to little avail.

4.5.1.1. The role of individual contract parties

What role do actors play in the development of private laws through contracts? The distinction between the law and juridical acts as a source of binding rules for parties does not mean that all contractual agreements are binding – this depends on the extent to which paties can realise their own aims through negotiating a contract. The view on the binding effects of contracts are in accordance with the more general principled view and notions of *Fremdbestimmung*.

A central concept underlying the binding force of contracts is the concept of the *Richtigkeitsgewähr*[319] defended by Schmidt-Rimpler:

> 'Der Vertrag ist ein *Mechanismus*, um ohne hoheitliche Gestaltung in *begrenztem* Rahmen eine richtige Regelung auch gegen unrichtigen Willen herbeizuführen, weil immer der durch die Unrichtigkeit Betroffene zustimmen muß.'[320]

[318] Buck-Heeb & Dieckmann p. 218.
[319] This concept has, as such, not been studied in the Dutch legal order and also does not seem to have been studied in common law jurisdictions despite the emphasis on "contract as bargain". The concept may be more familiar in legal orders more influenced by the German legal order such as the Austrian legal order.

Linguistically, the *Richtigkeitsgewähr* refers to the safeguard ('*Gewähr*') of just and effective agreements ('*Richtigkeit*').[321] That does not mean that the law as such assumes that all parties negotiations are correct; merely, it respects the outcome of parties negotiations as an expression of mutual party autonomy. Some authors[322] have argued that it is more convincing to speak of '*Richtigkeitschance*' - the chance, rather than the warranty, that parties will come to just and effective agreements.

Thus, the *Richtigkeitsgewähr* explains why contracts should be binding, and moreover, why it should be binding on contact parties and not on others. This question has been discussed extensively in contact theory. However, other legal orders have come up with diverging suggestions.[323] Accordingly, the binding force of contracts has been justified on the basis of utilitarian principles, society's legal views on justice, and the mutual beneficiality of mutual executory promises,[324] while other explanations base the binding force of contracts on party autonomy.[325] The concept of *Richtigkeitsgewähr*, at first sight, is reminiscent of the concent of "contract as bargain", visible in the English and U.S. legal order, expressed, for example, in the requirement of consideration.[326] Especially the emphasis on parties bargaining for consideration is reminiscent of the *Richtigkeitsgewähr*.[327] However, differently from the German perspective, the process-based explanation of the requirement of consideration still requires that something of value in the eyes of the law is exchanged. This theory does not look sufficiently critically at the quality of the bargaining process and the actors in that process. Therefore, this theory fails to explain why agreements between some parties (such as financial arrangements between family members) are not meant to be binding, whereas some business agreements that have not expressly been negotiated should be binding.[328] In contrast, the *Richtigkeitsgewähr* has no trouble in the circumstance that there may be cases in which negotiations will not necessarily lead to results that should be upheld.[329]

Moreover, the process-based explanation of consideration overlooks implicit negotiations between parties. Of course the assumption that parties negotiate before entering into a contract may not always be realistic, yet even if parties are not inclined to negotiate everyday contracts, they may still choose with whom to do business, based on, for example, the pricing and quality of products offered for sale.

These justifications differ from the justification provided by the *Richtigkeitsgewähr* that should not, according to Schmidt-Rimpler,[330] be traced to parties' wills, as those wills are not necessarily laudable, and consequently, the main basis of the *Richtigkeitsgewähr* is not the

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[320] W. Schmidt-Rimpler, 'Grundfragen einer Erneuerung des Vertragsrechts', *AcP* 1941, p. 156.
[321] W. Schmidt-Rimpler 1941, p. 132, defines '*Richtig*', as, on the one hand, "just" as well as "effective", seen from the point of view of a legal order. Effectiveness may however not contradict justice (p. 133). See critically L. Raiser, 'Vertragsfunktion und Vertragsfreiheit', in: E. von Caemmerer, E. Friesenhahn, R. Lange (eds.), *Hundert Jahre deutsches Rechtsleben, Festschrift zum hundertjährigen Bestehen des Deutschen Juristentages, I*, Muller: Karlsruhge 1960, p. 118.
[322] Roth/Schubert MunchKomm zum BGB 2012, art 242 nr 463, following M. Wolf, *Rechtsgeschäftliche Entscheidungsfreiheit und vertraglicher Interessenausgleich*, Mohr Siebeck: Tübingen 1970, p. 73-74.
[323] See for an overview of the most common theories and their defects R. Barnett, 'A consent theory of contract', *Columbia Law Review* 1986, p. 269.
[324] P.S. Atiyah, *Promises, morals, and the law*, Clarendon: Oxford 1982, p. 209 et seq.
[325] Ch. Fried, *Contract as promise: A theory of contractual obligation*, Hardvard University Press: Cambridge 1981.
[326] This requirement entails that a party can only enforce a prominent as a contractually binding promise if the promisee must suffer a detriment or the promisor must obtain some benefit. In Englsih law, consideration can be traced to *Pinnel's* case, (1603) 77 ER 237. In U.S. law, the requirement of consideration can be found in section 71 of the Restatement (Second) of Contracts.
[327] R. Barnett, 'A consent theory of contract', *Columbia Law Review* 1986, p. 287.
[328] R. Barnett, 'A consent theory of contract', *Columbia Law Review* 1986, p.289-290.
[329] Comp. W. Schmidt-Rimpler, *Festschrift für Ludwig Raiser*, p. 13-14, 17.
[330] W. Schmidt-Rimpler 1941, p. 157, 170-172 as well as W. Schmidt-Rimpler, 'Zum Problem der Geschäftsgrundlage', in: R. Dietz (ed.), *Festschrift für Hans Carl Nipperdey zum 60. Geburtstag*, Beck Verlag: München 1955, p. 8. See differently W. Flume, 'Rechtsgeschaft und Privatautonomie', in: *Hundert Jahre deutsches Rechtsleben, I*, Muller: Karlsruhge 1960, p. 141.

idea that contracts are a way for individual parties to realise *Selbstbestimmung*. Instead, the *Richtigkeitsgewähr* emphasises contract parties' negotiations with one another. Consequently, contracts will usually also contain an element of *Fremdbestimmung* for each party, as the result of the contract is a *compromise* between parties and the terms of the contract are influenced by *both* parties. If and insofar as both parties are able to establish their own rules through contracting with one another, there is *Selbstbestimmung* for both parties.[331] The positive *Richtigkeitsgewähr* entails that negotiations lead to a contract where that is in both parties' interests, while the negative *Richtigkeitsgewähr* entails that if during negotiations parties find that a contract is not in their mutual interest, there will be no contract.[332]

Schmidt-Rimpler[333] has emphasised that the idea of *Richtigkeitsgewähr* does not mean that contracts should be seen as a source of law,[334] and the principle of party autonomy does, accordingly, not mean that parties are competent to develop private law. This argument can be traced to the distinction between *Rechtnormen* and *Rechtsgeschäfte*, and the underlying assumption that private parties act mainly in their own interests. This line of reasoning also limits the effect of contracts: contracts binding on third parties would bind third parties to rules that would be in the interest of contract parties but not of third parties, and problems of *Fremdbestimmung* would arise. Consequently, differently from other theories on the binding force of contract, the *Richtigkeitsgewähr*, and the *Fremdbestimmung* that arises in the absence of *Richtigkeitsgewähr*, also offers an explanantion for limiting the binding force of contracts negotiated between parties.

Accordingly, it indicates that limits should be imposed on the role of private parties where that is not the case. Particularly, in cases of mistake, where the will of parties in negotiations is defective,[335] or if parties do not have a of choice of contract parties.[336] Also, negotiations will not necessarily result in an outcome representing both parties' interests if parties are not in equal bargaining positions.[337] Importantly, however, the *Richtigkeitsgewähr* itself will not indicate in which cases parties are unequal to such an extent that contracts between them should not be upheld – the decision to, for example, protect weaker parties by imposing limits on what parties can negotiate by establishing mandatory consumer protection, is the outcome of the political process. [338]

Thus, the *Richtigkeitsgewähr* is not based on a formal view of contract parties negotiations, nor can it be said that the law simply assumes that because parties negotiate, the outcome needs to be respected. The law goes further and looks at the quality of the bargaining process. Therefore, differently from justifications for the binding force of contracts in other legal orders,[339] the justification of the binding force of contracts on contract parties remains the negotiation process between parties, and the limitation of parties' negotiation

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[331] W. Schmidt-Rimpler, 'Zum Vertragsproblem', in: F. Baur et al (eds.), *Funktionswandel der Privatrechtsinstitutionen, Festschrift für Ludwig Raiser zum 70. Geburtstag*, Mohr: Tübingen 1974, p. 20-22. The idea has been criticised as well, for example K. Adomeit, 'Die gestärte Vertragsparität – ein Trugbild', *NJW* 1994, p. 2468.
[332] W. Schmidt-Rimpler, *Festschrift für Ludwig Raiser*, p. 6.
[333] W. Schmidt-Rimpler, 'Grundfragen einer Erneuerung des Vertragsrechts', *AcP* 1941**,** p. 156, 159, 161, 164. Similarly W. Flume, 'Rechtsgeschaft und Privatautonomie', in: *Hundert Jahre deutsches Rechtsleben,* p. 141-142. See differently F. Roschr, 'Vertragrechtstheorie mit Herrschaftsfunktion?', *ZRP* 1972, p. 111.
[334] C.F. von Savigny, *System des heutigen römischen Rechts, I*, Veit: Berlin 1840 p. 12.
[335] Schmidt-Rimpler p. 182, as well as W. Schmidt-Rimpler, *Festschrift für Hans Carl Nipperdey*, p. 10.
[336] See further F. Bydlinski, 'Kontrahierungszwang', *AcP* 1980, p. 1.
[337] Comp. the criticism of L. Raiser, *Hundert Jahre deutsches Rechtsleben, I*, 1960, p. 118. Differently U. Wackerbarth, 'Unternehmer, Verbraucher, und die Rechtfertigung der Inhaltskontrolle vorformulierter Verträge', *AcP* 2000, p. 57.
[338] Comp. prominently on this development C.-W. Canaris, 'Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Marerialisierung"', *AcP* 2000, p. 273, 278.
[339] See for example P.S. Atiyah, *Promises, morals, and the law*, Clarendon: Oxford 1982, p. 215.

room, or the development of doctrines of mistake and duress, do not displace parties' *mutual* autonomy as a basis for the binding force of contracts.

If contracts do not fall within the scope of the *Richtigkeitsgewähr*, the role of parties can be limited through various means. Inequality of parties and the lack of a bargaining process may be a reason for judicial control of STC's.[340] It is also possible that the executive encourages stakeholder organisations to provide guidelines and other instruments that improve weaker parties' bargaining position.[341] The problem of *Fremdbestimmung* may also trigger constitutional protection, for example if the weaker party's lack of choice of contract parties leads to breach of the right to free personal development in article 2 GG.[342] In addition, the role of contract parties may be restricted by mandatory law.

Thus, the *Richtigkeitsgewähr* also explains when contracts should not be binding, or when the binding force of contracts should be subject to contract mechansims- in other words, when the role of contract parties, or, more particularly, one contract party, should be limited. Other legal orders have not developed similar jusitifications that consistently justify the development of control mechanisms.

The role of actors entering into contracts falling under the scope of the private law *acquis* differs as the *acquis* is fragmented and the European legislator has not emphasised the quality of the negotiating process. Also, it has been argued that the view that private parties mainly pursue their own interests rather than the public interest has not been defended as such at the European level.[343]

Does the *acquis* limits the role of strong parties because stronger parties, in the pursuit of their own interests, will otherwise impose their terms on weaker parties? Arguably, the position and therefore the potential role of consumers is strengthened by cooling off periods and information duties in the *acquis* as they enable consumers to enter into a contract on the basis of sufficient information. Importantly, the *acquis* has not recognised, as such, a general principle to protect parties with weak bargaining positions, nor has the *acquis* or soft laws expressly considered the negotiation process preceding a contract. The *acquis* has accordingly also not developed rules in the area of mistake and other defects in consent. Although the *acquis* and soft law emphasise that in order to conclude a contract, parties need to agree, the way in which they come to this agreement has not been subject to further consideration. Thus, the role of weak parties is not consistently subject to restrictions at the European level, but national mandatory law and case law may nevertheless limit the role of foreign strong parties entering into contracts with weaker German parties.

Even if the protection of consumers may be interpreted in accordance with the *Richtigkeitsgewähr*, it does not offer a reliable basis for assessing in what direction the private law *acquis* will develop. Also, a European *Richtigkeitsgewähr* would not necessarily lead to similar limitations to the binding effect of contracts, as the views on when negotiating processes are defect or absent may differ. Consequently, the role of contract parties might still be subject to different restrictions.

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[340] This option was rejected by Schmidt-Rimpler, 1941**,** p. 157, 167. Arguably, judicial control does not "restore" private parties' autonomy. Instead, altering the contract puts the judge in the position of contract parties.

[341] For example, the the Bundesministerium (BMELV) has advocated the development of such instruments, which has resulted in established protocols and checklists for negotiations with banks and finance companies. See http://www.bmelv.de/DE/Verbraucherschutz/Finanzen-Versicherung/finanzen-versicherung_node.html and http://www.vz-nrw.de/UNIQ134003479704955/link780871A.html.

[342] See for example BVerfG 27 August 2005, *NJW* 2006, 598, par. 2 b aa.

[343] Comp. for example the notes to articles II- I: 101 et seq DCFR and the notes to these articles that do not discuss this principle.

4.5.1.2. Collective contracts

What role have actors played in the development of private law through collectively negotiated contracts?[344] Firstly, instances of collective contracts will be considered, and secondly, the role of non-state actors in the development of collective contracts will be considered. Thirdly, the paragraph will ask what limitations are placed on the roles of non-state actors through the development of control mechanisms.

4.5.1.2.1. The use of collective contracts

The German legislator has recognised the use of collective contracts in various areas.[345] Prominent examples are

- Article 36 *Urhebergesetz* ('UrhG') stipulates that associations of proprietors of intellectual property rights may negotiate with associations of users[346] to determine the reasonable compensation in the meaning of article 32 UrhG, in accordance with the circumstances in that branche.[347]

- Article 12 Urheberrechtswahrnehmungsgesetz ('UhrWG') obliges copyright collectives ('*Verwertungsgesellschaft*') that manage copyrights in trust for owners of copyrighted works, to enter into collective agreements with associations representing users with regard to the rights managed by the collective. In these cases, there is an obligation to enter into an agreement, unless this cannot be asked from the copyright collective as the association of users has too few members.

- Articles 558c and 558d BGB enable municipalities to establish simple (558c) or qualified (558d) '*Mietspiegels*', an instrument to establish the height of rents in that municipality that are established by municipalities or through negotiations between stakeholder organisations. Additionally, qualified *Mietspiegels* are established in accordance with scientific principles,[348] which may improve the chance that a *Mietspiegel* adequately reflects the market for accommodation in a particular municipality. This is important because article 558d par. 3 BGB stipulates that a qualified *Mietspiegel* will be assumed to reflect the height of rents usual in a particular area.

In addition, private parties have also recognised the benefits of collective contracts. This may take various forms. Some of these contracts seem to be based on the idea that collective contracts may be in accordance with the *Richtigkeitsgewähr* more than individual contracts. Collective contracts in accordance wit this idea are

[344] Collective contracts are frequently referred to as *Vereinbarungen*. This paragraph focusses on contracts that have been negotiated collectively by parties and that do not subsequently become directly binding on parties on the the basis of law, such as TV's and BV's. Consequently, these collective contracts are considered self-regulation rather than co-regulation, and they differ from collective labour agreements that become *Rechtsnormen*.
[345] Comp. G. Bachmann, *Private Ordnung*, p. 33, who questions the use of *Vereinbarungen* by the legislator: firstly, whether the legislator is competent to give binding effect to these agreements, and secondly, whether the use of *Vereinbarungen* lead to problems with unfair competition.
[346] See for an overview of agreements under article 36 UrhG Urheberrecht/Wantke/Grunert (2009) article 36 nr 31-34.
[347] Under article 32 UrhG, the outcome of negotiations is considered reasonable in the sense of article 32 UrhG.
[348] It is however unclear what this additional requirement entails exactly – it has been held thatthis could entail representative random surveys, see MunchKomm zum BGB/Arzt (2012), article 558d BGB, nr 2.

- Collective contracts such as insurance contracts negotiated between third parties to the collective contract – such as employers – on behalf of weaker parties – such as employees.

- Contracts concluded via platforms such as Groupon,[349] that are in accordance with the idea that as the amount of consumers grows, consumers – as a group – can negotiate better terms for themselves, in accordance with the idea of *Richtigkeitsgewähr*. In these cases, the lack of the possibility to individually (re)negotiate the terms of the contracts offered to groups is compensated by the choice to opt in or opt out of the contract, if that is in the interests of potential contract parties.[350] Interestingly, the fora for complaints for collective contracts such as Groupon indicate that complaints may in some cases lead to compensation.[351]

In some collective contracts, it is not clear whether parties negotiate on behalf of, or in the interests of future contract parties, which may theoretically make a balanced collective contract to the benefit of all contract parties less likely, and in some cases, the *Richtigkeitsgewähr* is clearly absent. This is the case when parties may choose to enter into agreements drafted as an alternative to a TV or a BV, for example because these agreements are more flexible, or, possibly, to circumvent the inclusion of unions and works councils that have more expertise, experience and a stronger position when it comes to negotiating on employment matters. Agreements in accordance with this idea include

- Guidelines ('*Richtlinienverträge*') or recommendations that go beyond stipulating employment contracts and address a wide range of social issues.[352]

- Agreements with businesses – especially hospitals – and unions ('*Gestellungsvertrag*') in order for their members to work for those hospitals. Although an employment contract is not established between the hospitals and the members, the hospital may have some duties similar to an employer, and members can elect and be elected for the works councils.[353]

The European legislator has generally not made use of collective contracts, with the exception of framework agreements that are subsequently turned into law. Additionally, the Commission has frequently attempted to encourage 'dialogue' between stakeholders at the European level,[354] which has also been used in the drafting of legislation.[355] A prominent example is:

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[349] This is a US-based platform, on which goods and services are offered, with a discount, per city, excluding applicability of the CISG and applying German law to its contracts. See further http://www.groupon.de/wie-funktioniert-groupon.
[350] However, the question arises, what happens if, despite the possibility to opt into group contracts, these contracts turn out to be to the disadvantage of either sellers or consumers. Comp. for example S. Iwersen, 'Ergo trickste auch bei Betriebsrenten', *Handelblatt* 27.7.2011, available at http://www.handelsblatt.com/unternehmen/versicherungen/skandal-versicherung-ergo-trickste-auch-bei-betriebsrenten-seite-all/4437306-all.html**.** Collective contracts concluded via platforms also show defects, for example if sellers do not recognise coupons or are booked because of the large amount of consumers responding to an offer, see Lena K., 'Groupon: Kursverluste nach Sperrfirst-Ende, weiterhin Probleme mit Deal-Qualität', *Finanzwelt-News* 4 June 2012, http://www.finanzwelt-news.de/groupon-kursverluste-sperrfrist-dealqualitaet/.
[351] Comp. the amount of resolved complaints at http://de.reclabox.com/firma/1168-Groupon-GmbH. There are also 3 complaints on http://verbraucherschutz.de/?s=groupon, including the reaction from Groupon.
[352] Kommentar zum TVG/Wiedenmann (2007) article 1 nr 20, 21.
[353] See further Münchener Handbuch zum Arbeitsrecht/Richardi (2009), article 340, Nichtärztliche Heilberufe und Heilhilfsberufe, nr 6 et seq.
[354] See for example COM (2000) 248 final, p. 9-10 and more recently the European Parliament resolution of 20 May 2008 on EU Consumer Policy Strategy 2007-2013, A6-0155/2008, par. 6.7.

The 2001 Recommendation[356] that contained a substantive code of conduct on mortgage loans, which provides two standards form of information that is to be provided to the consumer. The information requirements are the result of negotiations between consumer organisations and European Credit Sector Associations under the supervision of the Commission.[357]

The Commission has sought to facilitate dialogue between stakeholders at the European level, in order to improve the STC's used in travel package contracts. To evaluate the willingness of stakeholders, the Commission – not the BEUC – consulted the Consumer Committee[358] while the European Confederation of Travel Agencies ('ECTA') consulted its members, after which the Commission set up a group consisting of stakeholders and national experts.

4.5.1.2.2. The role of non-state actors

What role do non-state actors play in the development of collective contracts? Firstly, in some cases, the national legislator has provided a framework for collective contracts, providing non-state actors with the possibility to negotiate agreements that are subsequently presumed to be in accordance with the law. This presumption provides negotiating parties with a prominent role that may give rise to *Fremdbestimmung*, thereby limiting the role of third parties subjected to these agreements. *Fremdbestimmung* is visible in collective contracts on intellectual property rights under article 32 UrhG, and *Mietspiegels*.

Fremdbestimmung may arise from the collective agreements on the use intellectual property rights, which may bind members if members negotiating on the contract have been authorised to negotiate on behalf of their members.[359] Otherwise, the agreement on compensation will be considered reasonable, and parties cannot rebut this assumption, as article 32 par. 2 UrhG makes clear.[360] Including provisions negotiated under this article may also indicate that they are commonly used in a particular branche,[361] which may affect the height of compensation in third parties' cases, especially if they do not agree on a specific price. In this respect, Hertin[362] finds the lack of publicity problematic considering the normative character ('*Normcharakter*') of these agreements. For the development of collective agreements under article 36 UrhG, the efficiency of the bargaining processes could be an assumption that justifies providing a framework for collective negotiations.

'Simple' *Mietspiegels* have also gained a considerable role in challenging the raise of rents that is not in accordance with the *Mietspiegel*.[363] *Mietspiegels* are well-established and considered to be in the interests of both tenants and landlords.[364] Thus, it seems as if the outcome of negotiations, as well as municipal decisions, is considered 'correct', reminiscent of the *Richtigkeitsgewähr*. Both for simple and qualified *Mietspiegels*, questions of *Fremdbestimmung* may also arise, because of the assumption under article 558d par. BGB and the role of simple *Mietspiegels* in indicating the usual height of rents in a municipality. For qualified *Mietspiegels*, more questions of *Fremdbestimmung* may

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[355] See for example the dialogue between consumers and industry in the drafting of the proposal for a Directive on mortgage, COM (2011) 142 final, see further http://ec.europa.eu/internal_market/finservices-retail/credit/mortgage_en.htm.
[356] Recommendation OJ L 69/25, 10.03.2001.
[357] See the European Agreement on a voluntary code of conduct on pre-contractual agreements for home loans, and the register of signatories, available at http://ec.europa.eu/internal_market/finservices-retail/home-loans/code_en.htm.
[358] Currently, this is the European Consumer Consultative Group that consists of representatives of national and European consumer organisations as well as two associate members and two EEA observers, see further http://ec.europa.eu/consumers/empowerment/eccg_en.htm.
[359] Urheberrecht/Wantke/Grunert (2009) article 36 nr 18.
[360] Urheberrecht/Wantke/Grunert (2009) article 36 nr 2. See further S. Basse, *Gemeinsame Vergütungsregeln im Urhebervertragsrecht*, Logos: Berlin 2007.
[361] Urheberrecht/Wantke/Grunert (2009) article 36 nr 6.
[362] P.W. Hertin, 'Urhebervertragsnovelle 2002: Up-Date von Urheberrechtsverträgen', *MMR* 2003, p. 17.
[363] MunchKomm zum BGB/Arzt (2012), article 558c BGB, nr 5, G. Bachmann, *Private Ordnung* p. 337.
[364] U.P. Börstinghaus, 'Der qualifizierte Mietspiegel - Die Geschichte einer „Verschlimmbesserung"', *NZM* 2000, p. 1088.

arise as the drafting of third parties is not infrequently left to third parties.[365] Moreover, article 558a par. 2 BGB establishes that landlords will refer to *Mietspiegels* when establishing or raising the rent, even when they diverge from *Mietspiegel*, which may well trigger challenges from tenants. Although a *Mietspiegel* can thus affect third parties' disputes, citizens cannot challenge a *Mietspiegel* before administrative courts; instead, civil courts have been indicated as competent to evaluate the correctness of qualified *Mietspiegel*.[366]

The role of non-state actors in other collective contracts depends on the question whether contracts fall within the scope of the *Richtigkeitsgewähr* or whether they give rise to *Fremdbestimmung*. Notably, various collective contracts are concluded on the behalf of third parties by stronger parties, but they frequently lack binding force. Therefore, third parties are only bound if they opt into these contracts, which makes it more likely that these contracts fall within the scope of the *Richtigkeitsgewähr*. Notably, this provides stronger parties negotiating on the behalf of weaker parties with a considerable role, whereas it provides weaker parties with more possibilities to enter into contracts that they consider to their benefit.

For example, agreements drafted as an alternative to TV's ('*Koalitonsvereinbarungen*') do not have a binding force similar to TV's.[367] Moreover, in cases where unions or other associations have negotiated on behalf of their members, problems of *Fremdbestimmung* will generally not arise, as the effect of these agreements will generally be limited to members, who will have subjected themselves to these collectively negotiated rules. Similarly, collective contracts such as collective insurance contracts or Groupon contracts do not become binding on third parties, and *Fremdbestimmung* will not arise.

The role of actors in European dialogues differs, as these dialogues have been organised by European state actors. Thus, non-state actors have less choice to enter into these dialogues; they mus be invited. However, if non-state actors have been invited, their negotiations can have considerable influence, as the outcome of these negotiations has generally been used as a basis for legislation. Thus, so far, the European legislator considers collective negotiations as a suitable way to further responsive lawmaking.

4.5.1.2.3. Limitations to the role of non-state actors

How have state actors limited the role of non-state actors through collective contracts? At the national level, the possibility of *Fremdbestimmung* has prompted the development of control mechanisms that limit non-state actors' roles:

- For some collective contracts, especially collectively negotiated STC's, judicial evaluation may be exercised.

- Mandatory law may limit non-state actors' roles.

Accordingly, article 32 UrhG provides mandatory protection of weaker parties – artists – against users in article 36 UrhG that provides a framework for collective negotiation. Furthermore, article 32 par. 4 stipulates that parties to this agreement cannot diverge from the agreement to the detriment of the

[365] U.P. Börstinghaus, C. Börstinghaus, ´Qualifizierte Mietspiegel in der Praxis - Eine empirische Untersuchung über Akzeptanz und praktische Umsetzung des neuen Rechtsinstruments´, *NZM* 2003, p. 383.
[366] MunchKomm zum BGB/Arzt (2012), article 558c BGB, nr 3.
[367] See further on the use of collective agreements other than Tarifverträge U. Zachert, '"Jenseits des Tarifvertrags"? - Sonstige Kollektivvereinbarungen der Koalitionen', *NZA* 2006, p. 10.

proprietor. Also, article 32a UrhG establishes the possibility to renegotiate if there is a clear imbalance (‘*auffälliges Missverhältnis*’) between the compensation and the benefit from the use of the intellectually protected works.[368] Moreover, the emphasis on the representativeness, independence (of potential contract parties) involved in negotiations under article 36 UrhG,[369] and competence can also be seen in this light.[370]

For collective contracts with for example consumers or policyholders, the legislator has recognised that the *Richtigkeitsgewähr* may be absent because of the unequal bargaining position between parties and has established mandatory protection for weaker parties. Accordingly, for insurance contracts, articles 6 and 7 Versicherungsvertragsgesetz establish information and advise duties for insurers.[371] If contracts concluded via Groupon fall within the scope of articles 312b et seq BGB, which implement Directive 97/7 for contracts and which will be amended for the implementation of Directive 2011/ 83 on consumer rights, article 312c BGB establishing information duties is applicable, while, if contracts are concluded solely via internet, the information duties under articles 312b BGB may – also – become applicable. However, these duties do not become relevant because it concerns a “collective” contract – if consumers opt into Groupon contracts, they enter into individual contracts.

At the European level, the role of non-state actors is limited as state actors play a central role in the selection of negotiating parties. Also, the decision whether the outcome of negotiations will be used in legislation is reserved to the European legislator, who may also seek to establish Recommendations rather than binding rules.

4.5.1.2.4. Conclusion on collective contracts

Non-state actors play a considerable role in the development of collective contracts, especially if the legislator has reinforced the outcome of parties’ negotiations, which is likely to lead to *Fremdbestimmung*. Notably, this possibility has in turn given rise to control mechanisms that confine the role of contract parties to establish rules that may become binding on third parties. Contract parties may also play a considerable role at the European level, once they have been selected to participate in collective dialogues.

4.5.1.3. Model contracts

This paragraph will ask what role contract parties play in the development of private law through model contracts and how actors have approached the use of model contracts. Firstly, the paragraph will turn instances of model contracts, and consider the role of non-state actors through model contracts. Subsequently, limitations to the role of non-state actors through the development of control mechanisms will be considered.

The use of model contracts (‘*Formulare*’, ‘*Musterverträge*’, ‘*Standardverträge*’) enables parties to draft (parts of) contracts in advance, and they are widely used.[372] Beyond

[368] Urheberrecht/Wantke/Grunert (2009) article 32a nr 16 state that the question whether there is a clear imbalance is left to individual cases. See for an overview of case law nr 19.
[369] This may be a reason against the competence of associations representing both the interests of users and proprietors, see Urheberrecht/Wantke/Grunert (2009) article 36 nr 14.
[370] It is however unclear what these requirements entail exactly. According to Spindler/Schuster, Recht der elektronischen Medien/Wiebe (2011), UrhG article 36, nr 2, the requirements may not be interpreted too strictly, as parties may otherwise seek to evade these agreements.
[371] See further MunchKomm zum VVG/Armbrüster (2012) introduction to articles 6 and 7, nr 6 et seq.
[372] Ulmer/Brandner/Hensen/AGB-Recht/Ulmer/Habersack (2011), article 305, nr 66 note that the use of model contracts is widespread in various branches, including insurance, tenant contracts for accomodation and motor vehicles, estate agents, tour operating, leasing, agency and dealership.

the national level, stakeholders[373] and international organisations[374] have provided their members with model contracts.

The role of non-state actors through model contracts can be considerable, especially if drafted by international organisations or stakeholder groups with many members using these models. In this way, drafters may influence the rights and obligations of many third parties. This does not mean that model contracts are binding, as parties must opt for the use of these models.

In these cases, notably, principles of private autonomy and the doctrine of the *Richtigkeitsgewähr* also offer a justification for the binding force of model contracts and limitations to the binding force of model contracts. Accordingly, the role of contract parties is limited as the use of predrafted model contracts, to be used in multiple contracts,[375] entails that the bargaining of contract parties, on which the *Richtigkeitsgewähr* is based, is limited.[376] This limitation justifies judicial control under article 305-310 BGB.

This judicial control of has been criticised. Firstly, as Coester-Waltjen[377] has pointed out, *Fremdbestimmung* will not necessarily arise as predrafted agreements need not point to contracts favourable to the user of the model contract. Typically, notaries are considered neutral third parties,[378] and it has been argued that subjecting these model contracts to judicial control may undermine the predictability of contracts drafted and approved by notaries.[379] Also, if, for example a stakeholder organisation enables its members to do business with one another, it does not follow that a model is necessarily to the advantage of one of the contract parties. However, the current regime does not seem to distinguish between model contracts drafted by neutral third parties or by users themselves, to their own benefit, as it still concerns contracts that will, to contract parties, appear to be correct without being negotiated.[380] Thus, regardless of drafters' interests, their roles remain limited. Secondly, even if model contracts do benefit one contract party over the other,[381] the question arises whether judicial control is still necessary in cases where a model contract has been explained to contract parties, in accordance with, for example, a notary's duty of care ('*Belehrungspflicht*') under article 17 *Beurkundungsgesetz*. Although explaining the consequences of model contracts may not simultaneously entail negotiating about these terms, the question arises whether this duty may for example cause a contract party to reconsider entering into an agreement. Thus, can neutral non-state actors not similarly mitigate *Fremdbestimmung*, or should this be left to state actors?

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[373] For example, Orgalime provides its members with model contracts, see http://www.orgalime.org/publications/forms.htm or the model contracts of the Loan Market Association, see http://www.lma.eu.com/documents.aspx.

[374] Example range form the ICC, (http://www.iccwbo.org/) the International Swap and Derivations Organisation (http://www2.isda.org/functional-areas/legal-and-documentation/protocols/), tp the International Trade Centre, see http://www.intracen.org/, and the Association of International petroleum negotiatiors, see http://www.aipn.org/mcvisitors.aspx.

[375] MunchKomm/Basedow (2012), article 305, nr 13, 18-19, 21. For contracts between businesses and consumers, article 310 par. 3 sub 2 BGB stipulates that even if predrafted agreements are used only once, they will be subject to judicial control, insofar as the consumer could not influence the content of the model contract. H. Roth, 'Verbraucherschutz- Entwicklungen und Grenzen', in: E. Lorenz (ed.), *Karlsruher Forum 2011: Verbraucherschutz- Entwicklungen und Grenzen*, Versicherungswirtschaft: Karlsruhe 2012, p. 31 has pointed out that this rule has not resulted in a lot of decisions and is considered of little meaning.

[376] E. Schmidt, 'Die Verbandsklage nach dem AGB-Gesetz', *NJW* 1989, p. 1193.

[377] D. Coester-Waltjen, 'Die Inhaltskontrolle von Verträgen außerhalb des AGBG', *AcP* 1990, p. 20. Comp. MunchKomm/Basedow (2012), article 305, nr 22 et seq, who points out that it can be doubted whether model contracts fall under article 305 et seq BGB as they will typically not be imposed on one party by the other party. Critically also M. Habersack, 'Richtigkeitsgewähr notariell beurkundeter Verträge', *AcP* 1989, p. 419-421.

[378] See critically R. Stürner, 'Zur Gleichsetzung von Notarformularen und allgemeinen Geschäftsbedingungen einer Vertragspartei', *JZ* 1979, p. 758.

[379] Ulmer/Brander/Hensen, AGB-Recht/ Ulmer/Schäfer (2011), article 310, nr 82.

[380] Loosschelders/Olzen/Staudinger (2012) article 242, nr 477, as well as Munch Komm/Basedow (2012), article 310, nr 62-64.

[381] For example if stakeholder organisations provide their members with model contracts to do business with parties from another branche. If models used by third parties employed by one party –for example one contract parties' 'regular' notary – that affects contract parties' legal position to the benefit of the contract party regularly employing the notary.

The European legislator is not similarly concerned with potential *Fremdbestimmung* and has not limited the role of non-state actors through judicial control. To the contrary, because the use of model contracts may facilitate cross-border trade, the European Union has encouraged the use of models in its Directives – both Directive 2008/48 on consumer credit and the proposal for a Directive on mortgages contain standardised information forms. Through the use of these forms, businesses may more easily fulfil their information duties to consumers. However, the role of non-state actors drafting model forms is subject to approval from the European legislator as the choice to include these forms remains with the European legislator.

Thus, the roles of contract parties through model contracts under German law and European law diverge. However, these differences may not necessarily lead to problems as German law permits a larger role for private parties in several cases:

1) The involvement of state actors in model forms in Directives may be a reason to exempt these forms from judicial control, similar to the exemption of VOB/B clauses in article 310 BGB.

2) Model contracts may be exempt from judicial control if they reflect well-established customs in international trade or between parties, in accordance with articles 346 HGB and article 307 par. 3 BGB.

3) If both parties opt for well-established model contracts, contracts will not be subject to judicial evaluation as clauses have not been presented ('*gestellt*') by one of the parties to the contract in the sense of article 305 BGB.

4) Thus, contract parties drafting model contracts at the European level have a more prominent role than at the national level, but German law may well allow more room for contract parties if that does not lead to *Fremdbestimmung*.

4.5.1.4. Standard contract terms (STC's)

What role do actors play in the development of private law through STC's? Firstly, the paragraph will consider instances of often-used STC's. Secondly, the paragraph will sketch the role of non-state actors through STC's and thirdly, the limitations to the role of non-state actors through the development of control mechanisms will be discussed.

STC's are widely used:

- Several branch organizations have developed uniform STC's for their members.[382]

- Also, the STC's in some specific contracts can be established by *Verordung*.[383]

- The guidelines established in the articles of association of the *Deutsche Börse* may be considered a special case.[384]

[382] These STC's (and model contracts?) have to be reported to the German cartel office ('*Bundeskartellamt*'), see for an overview http://bundeskartellamt.eu/wEnglisch/img/pdf/AGB09.pdf) .
[383] For example for contracts for the supply of energy, under articles 11 par. 2 and 17 par. 3 Energy Section Act ('Energiewirtschaftsgesetz') and water, under article 243 Introductory Act to the BGB ('EGBGB').

- STC's may also be collectively negotiated. Even if STC's are negotiated collectively, this does not mean that they are negotiated by (representatives of) future contract parties, and consequently they do not fall within the *Richtigkeitsgewähr*.[385] Moreover, collectively negotiated STC's, although they may theoretically be less likely to overly benefit one contract party, still fall under the definition of STC's as they are a part of contracts that is unlikely to be negotiated further between parties.

- Similarly, beyond the national level, actors have sought to provide their members with model STC's.[386]

Contract parties drafting STC's may affect the rights and duties of both third parties and potential contract parties. Especially stakeholder groups and international organisations providing their members with model STC's that can be used in contracts with third parties affect the rights of these third parties. Also, the party drafting STC's may have a distinct advantage over his contract party, as his STC's, likely strengthening his legal position, form a starting point for negotiations.

However, the use of STC's does not fall within the scope of the *Richtigkeitsgewähr*, but gives rise to problems of *Fremdbestimmung*, which has prompted the German legislator and judiciary to develop control mechanisms that subject the role of users of STC's to limitations.

Specifically, *Fremdbestimmung* may arise as STC's will usually not be the result of negotiations.[387] Parties entering into a contract may not understand STC's, but even if they do, they may not have the time to evaluate STC's and negotiate terms that are to their detriment.[388] Potential contract parties may also not have the time to compare the STC's of different potential contract parties. Consequently, the use of STC's is typically neither based on negotiations nor on the competition of different parties' STC's,[389] which, in turn, may induce users of STC's to draft STC's that benefit their legal position towards future contract parties.[390]

The lack of *Richtigkeitsgewähr* justifies judicial control over STC's under article 307 BGB. Articles 308 and 309 BGB respectively provide a list of grey and black clauses. Notably, STC's may be subjected to judicial control before a contract is concluded, for example if STC's become a part of negotiations between parties, as article 305 BGB requires that STC's are presented, which does not require the conclusion of a contract. If STC's are 'unfair', they will be ineffective.

The Injunctions Act ('*Unterlassensklagengesetz*', 'UklaG') provides organisations in the sense of articles 3 and 3a UklaG with the possibility to claim an injunction stipulated in articles 1 and 2 UklaG. Article 7 UklaG stipulates that if a claim is upheld, this can also be

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[384] Buck-Heeb & Dieckmann 2010, p. 114.
[385] Ulmer/Brandner/Hensen/AGB-Recht/Ulmer/Habersack (2011), article 305, nr 59.
[386] Often mentioned examples include Orgalime, at the European level, and the ICC at the international level. UNCITRAL has endorsed various STC's developed by the ICC, see further http://www.uncitral.org/uncitral/en/other_organizations_texts.html.
[387] Contract parties have considerable discretion over individually negotiated terms that are not considered as STC's. Individual terms have precedence over STC's, in accordance with article 305b BGB. The main terms of the contracts will be important for contract parties and may well be individually negotiated, in which case these terms will fall within the *Richtigkeitsgewähr*, see Ulmer/Brandner/Hensen/AGB-Recht/Ulmer/Habersack (2011), article 305, nr 5.
[388] R. Zimmerman, *The new German law of obligations,* OUP: Oxford 2005, p. 176.
[389] See differently P. Hommelhoff, K.-U. Wiedenmann, 'Allgemeine Geschäftsbedinungen gegenüber Kaufleuten und unausgehandelte Klauseln in Verbraucherverträgen', *ZIP* 1993, p. 566, who finds that preformulating terms is, as such, not problematic, as it only becomes problematic when terms are drafted for *multiple* contracts.
[390] Ulmer/Brandner/Hensen/AGB-Recht/Ulmer/Habersack (2011) introduction, nr 5.

published. Not many claims have been brought under these provisions, which can be traced to the well-established and more successful injunction under article 8 Act against Unfair Competition ('*Gesetz gegen den unlauteren Wettbewerb*', 'UWG').[391]

The European legislator has similarly subjected the role of businesses entering into contracts with consumers to restrictions. To protect consumers, judicial evaluation under Directive 93/13 on unfair contract terms has been established. Accordingly, the role of stronger parties under the Directive may be subject to more limitations than is the case under German as, as Member States may extend the regime of the Directive to the main terms of the contract.[392] In contrast, German law leaves open the possibility for consumers to negotiate on STC's – which is not likely – that will accordingly fall within the *Richtigkeitsgewähr* and therefore not be subject to judicial evaluation.

More generally, the use of STC's generally is not considered problematic at the European level and contract parties are accoridngly left considerable considerable freedom under European law. Instead, the development of STC's that can be used across borders has been encouraged as uniform STC's may facilitate cross-border trade.[393] However, the development of cross-border trade through these means has proven to be problematic.[394]

Thus, non-state actors may play a considerable role through the development of STC's, but both German and European actors have imposed considerable restraints on this role.

4.5.1.5. Conclusion on contractual self-regulation

Both under German law and European law, contract parties enjoy freedom of contract, and parties have considerable discretion to negotiate on the terms of their contracts. German and European law have equally recognised possibilities to strengthen the role of weaker parties in entering into contracts have been recognised, through information duties, withdrawal rights, and collective negotiations.

As German law has developed in accordance with the *Richtigkeitsgewähr*, German law has more consistently and frequently subjected the role of contract parties likely to impose their terms on either contract parties or third parties to limitations, both in individual contracts, collective contracts, model contracts, and STC's.

German actors have established various control mechanisms – mandatory law, judicial evaluation, participation of state actors in model contracts, model lists for unfair clauses and default law that may provide an indication of fairness. A control mechanism that does not limit the role of non-state actors as such is the development of collective enforcement mechanisms. However, the development of collective enforcement should, if frequently used, limit the role of users of STC's while providing potentially interested parties with a way to influence STC's.

European actors have developed similar mechanisms, but these mechanisms are not based on concerns of *Fremdbestimmung* and have not been consistently developed, and only for contracts between businesses to consumers.

[391] Ulmer/Brandner/Hensen/AGB-Recht/Ulmer/Habersack (2011) introduction, nr 72.
[392] CJEU 3 June 2010 (Caja de Ahorros), C-484/08, [2010] ECR, p. I-4785, par. 42-44.
[393] European Commission*, European Contract Law and the revision of the acquis: The way forward*, COM (2004) 651 final, p. 6-8.
[394] See further S. Whittaker, 'On the development of European standard contract terms', *ERCL* 2006, p. 60–61.

4.5.2. Self-regulation through articles of association

What role have organisations played in the development of private law through self-regulation based on articles of association?[395]

Paragraphs 4.5.2.1-4.5.2.3. will describe the use of self regulation based on articles association, respectively internal codes of conduct, sports associations' codes, and professional conduct codes, insofar as they are based on organisations' articles of association.[396] Paragraph 4.5.2.4. and 4.5.2.5. will also turn to the *Pressekodex* and *Werbekodex*. These codes have been developed through articles of association, but they are not binding on this basis. Nevertheless, these codes seem rather successful. Paragraph 4.5.2.6 will consider the role of non-state actors and paragraph 4.5.2.7. will address the limitations on the role of non-state actors through the development of control mechanisms. Paragraph 4.5.2.8. will compare the role of non-state actors and the limitation of non-state actors' roles and paragraph 4.5.2.9. will end with a conclusion.

4.5.2.1. Internally binding codes of conduct

Businesses may provide for an internal code of conduct in their articles of association. For limited liability companies ('*Aktiengesellschaft*', '*naamloze vennootschap*'), article 77 par. 2 AktG enables the board of commissioners to establish a code of conduct for the business in its internal rules and regulation ('*Geschäftsordnung*'), in accordance with guideline 4.1.3 of the corporate governance *Kodex*. If the board chooses not to do so, the executive board can establish such rules. Notably, if the business chooses to comply with the corporate governance *Kodex* and issues a declaration in the meaning of article 161 *Aktiengesetz* ('AktG'), this may require implementation of the *Kodex* within contracts of employment of board members and implementation of parts of the *Kodex* in the articles of association.[397] If codes of conduct are based on articles of association, decisions from businesses inconsistent with this declaration may in some cases be void.[398] Moreover, the question has arisen whether the *Kodex* that is valid within the company may be relevant for the interpretation of article 93 AktG that establishes a duty of care for the director, referring to the careful director ('*ordentliche und gewissenhaften Gesellschaftsleiter*').[399] Furthermore, the question has arisen whether the guidelines in the *Kodex* can be used in the interpretation of blanket clauses such as articles 93 and 116 AktG.[400]

Thus, the development of codes has been explicitly encouraged. Alternatively, businesses may also take widely developed codes such as the code on corporate social responsibility ('*Nachhaltigkeitskodex*')[401] or the corporate governance *Kodex* as a starting point for these internal codes, but they are not obliged to do so. According to Ringleb,[402] many businesses do not do so because of the need for frequent amendments to enable the

[395] Self-regulation on the basis of articles of association has been considered as a separate category in German literature, see further below par. 4.2.5.6 and 4.2.5.7.
[396] These codes do not include binding codes of conduct developed by sub-national actors representing, for example, professional organisations ('*Kammern*') trhat have not been included in this chapter.
[397] MunchKomm zum AktG/Semler (2003), article 161, nr 99.
[398] BGH 21.09.2009 - II ZR 174/08, *NZG* 2009, 1270.
[399] Buck-Heeb & Dieckmann 2010, p. 102.
[400] P. Hommelhoff, A. Schwab, 'Regelungsquellen und Regelungsebenen der Corporate Governance', in: P. Hommelhoff, K.J. Hopt, A. Von Werder (eds.), *Handbuch Corporate Governance*, Schmidt: Köln 2009, 2nd ed., p. 79 point out this can only be the case if guidelines reflect established practice.
[401] See further below par. 4.5.3.1.
[402] Ringleb, 'Die Umsetzung des Kodex in der Praxis', in: Ringleb et al (eds.), *Deutscher Corporate Governance Kodex*, 4th ed., 2010, III, nr. 1543.

Kodex to deal with developing business practices. In addition, businesses can establish best practices, '*Grundsätze ordnungsgemäßer Unternehmungsführung*'.

4.5.2.2. Sports' associations

Sports' associations, considered as non-economical associations in the meaning of article 21 BGB, may impose and enforce various sorts of rules against members that can be divided in rules with regard to the association (requirements for membership, contributions etc), and sports' rules (composition, constitution of teams etc) that are typically internally directed at members practicing a particular sport.

Typically, sports' associations are members of continental and international organisations, while individuals, as a rule, are members of regional or local organisations. In accordance with the Ein-Platz-Prinzip, only one association can become a member of the overarching organisation, per sport.[403] Buck-Heeb and Dieckman[404] explain the pyramid-like structure of sports' organisations by pointing to the necessity to establish uniform rules for international competitions. Members of local or regional associations may be bound to the internationally established rules on the basis of the articles of association of their association, stipulating that the association and its members are bound to the rules established by the overarching organisation, which in turn stipulates that it is bound to the rules established by its overarching organisation.

4.5.2.3. Internally binding codes for professionals

Notably, the binding force and the scope of professional codes may vary. This paragraph will first turn to the guidelines for insolvency administrators and the professional rules for public auditors, which seem well-developed. Subsequently, the paragraph will turn to other codes, established in the financial sector, that seem less well-developed or that pose less clear sanctions for unprofessional behaviour. Well-developed codes are:

- The codes established by the Association of Professional Insolvency Administrators of Germany ('*Verband Insolvenzverwalters Deutschlands e.V*', 'VID'), [405] after insolvency administration was recognised as an independent profession in the meaning of article 12 GG.[406]

This self-regulation includes the Principles of Proper Insolvency Administration ('*Grundsätze ordnungsgemäßer Insolvenzverwaltung*', 'GOI') [407] as well as professional standards ('*Berufsgrundsätze*').[408] Article 4 of the articles of association[409] requires that persons wishing to become a member must explicitly and in writing recognition the professional standards as well as the GOI. Thus, even if members would not be bound on the basis of the articles of association, they would

[403] See for example article 8 par. 2 of the articles of association of the German Soccer Association ('*Deutscher Fussball-Bund*', 'DFB'), available at http://www.dfb.de/uploads/media/02_Satzung_02.pdf, or article 9 par. 2 of the articles association of the German Tennis Association ('*Deutscher Tennis Bund*', 'DTB'), available at http://www.dtb-tennis.de/downloads/Satzung_2012.pdf.
[404] Buck-Heeb & Dieckman 2010, p. 67.
[405] Insolvenzurdnung/Braun (2012) article 56 nr 18 points to the possible overlap between the BRAO, when non-specialised lawyers act as insolvency administrators, and the GOI and the *Berufsgrundsätzen*.
[406] BverfG 3.8.2004, *NJW* 2004, 2725, par. B III 2 bb 2.
[407] Available at http://vid.de/images/stories/pdf_fuer_einzelseiten/grundstze_ordnungsgemaesser_insolvenzverwaltung_fassung_vom%2005.05.2012.pdf.
[408] Available at http://www.vid.de/images/stories/pdf_fuer_einzelseiten/vid-berufsgrundsaetze.pdf.
[409] Available at http://www.vid.de/images/stories/pdf_fuer_einzelseiten/vid-satzung_vom_5.5.2012.pdf.

be bound contractually, by their declaration. In addition, article 6 of the articles of association explicitly requires that members comply with professional standards and the GOI, while articles 8 and 9 of the articles of association enables the VID to impose a reprimand or exclusion for breach of these duties, as well as exclusion from the VID, summed up in article 13 of the articles of association. Furthermore, the VID refers to the recommendations of Prof. Uhlenbruck ('*Uhlenbruck-Kriterien*')[410] and the agreements on charts of accounts (*Kontenrahmen*, '*SKR-InsO*').[411] Frind[412] states that the principles developed by the VID are directed internally, but he also finds that these principles have proved very useful for the interpretation of the Insolvency regulation ('*Insolvenzordnung*', 'InsO'), even though these principles offer minimum standards only, which may lead to the petrification of these standards at only a minimum level. However, Frind also notes that the GOI and the *Berufsgrundsätze* can only be useful if they provide clear rules, which is not always the case.

- Uniform principles[413] established by the Institute of Public Auditors in Germany ('*Institut der Witschaftsprüfer in Deutschland e.V.*, 'IDW'),[414] in addition to self-regulation established by the *Wirtschaftprüferkammer*.

Article 4 pars. 8 and 9 of the articles of association establish that members have a duty to comply with these principles. Article 5 sub 4 makes clear that this breach can result in the exclusion of members, after a decision from the honorary council *('Ehrengericht*'), in accordance with article 11 par. 3, which also enables the *Ehrengericht* to disapprove of behaviour. Moreover, criminal procedures for breach of professional duties can also lead to suspension and exclusion, in accordance with article 5 sub 5 of the articles of association.

Many organisations in the financial sector have also sought to establish codes of conduct, but these codes do generally not pose clear sanctions for breaching professional codes of conduct, or sanctions that go barely beyond the minimum that is required. Codes established in this area are:

- The Verhaltenkodex[415] as well as the DGFR ('Deutsche Grundsätze für Finanz Research'),[416] established by the DVFA ('Deutsche Vereinigung für Finanzanalyse und Asset Management e.V.').[417]

Article 3 of the DVFA's articles of association stipulates that members have to recognise the professional rules ('*Standesrichtlinien*'). The articles of association of the DVFA enable to association to punish breaches of the rules by the *Ehrengericht*, which can impose fines up to € 5000 as well as exclusion from the association. Augsberg[418] points out that previously, these rules have been criticised as confusing and hardly going beyond the existing standards set by the law, which have led to reforms of the rules.

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[410] Available at http://vid.de/images/stories/pdf_fuer_einzelseiten/uhlenbruck-empfehlungen.pdf.
[411] See http://vid.de/de/qualitaet/kontenrahmen-gskr-insog.html.
[412] F. Frind, 'Der Einfluss von Selbstregularien der Insolvenzverwalter-Zusammenschlüsse bei der Auswahl, Aufsicht über und der Entlassung von Insolvenzverwaltern', *NZI* 2011, p. 785-786.
[413] Both the articles of association and the principles are available at http://www.idw.de/idw/portal/d589242/index.jsp.
[414] The IDW is also a member of several international organisations, which include the International Federation of Accountants (IFAC), the Fédération des Experts Comptables Européens (FEE). The IDW is also involved in the International Auditing and Assurance Standards Board (IAASB), and the International Ethics Standards Board for Accountants (IESBA). Augsberg 2001, p. 238 notes that its activities at the international level, where harmonisation has been ongoing, may accelerate the compliance of the German profession with international standards.
[415] Available at http://www.dvfa.de/mitgliedschaft/dok/35293.php.
[416] In turn, these guidelines consist of consisting of Grundsätzen ordnungsmäβiger Finanz Research (GoFR) and Mindestandards fuer Finanz Reserach (MSFR). See further Buck-Heeb & Dieckmann 2010, p. 110
[417] The DVFA is a member of the European Federation of Financial Analysts Societies (EFFAS, http://effas.net/) and the Association of Certified International Investment Analysts (ACIIA, http://www.aciia.org/pages/home.asp).
[418] Augsberg 2001, p. 240.

- The professional rules on advice on financial planning drafted by the Financial Planning Standards Board Deutschland.

The articles of association enable an *Ehrengericht* to impose sanctions on the breach of those rules, from suspension of the certificate to a duty to follow courses and exclusion from the association. The preamble to the rules state that if the behaviour of a member has been sanctioned by the judiciary, the *Ehrengericht* will subsequently evaluate whether that behaviour was in accordance with the professional code of conduct. Somewhat confusingly, however, article 18.2 of the articles of association stipulate that state courts are only competent after the *Ehrengericht* has judged the case.[419]

- The professional rules established by the advisory committee of the BVFF ('*Bundesverband für den Fachhandel Finanzdienstleistungen e.V.*'),[420] breach of which can be disciplined with exclusion.[421]

- The code of ethics and the standards of professional conduct established by the German CFA Society, that can be traced to the CFA institute, the international organisation that it is a member of. Augsberg[422] notes that as the rules come from a foreign party, members are not bound by the statutes of the association but from their own recognition of the code of conduct, which members have to reaffirm yearly, in writing.[423]

- The code of conduct[424] of the association for independent consultancy experts on renumeration ('*Vereinigung unabhängiger Vergütungsberater*', 'VUVB'), on the basis of article 2 of its articles of association.[425] Although neither the code nor the articles of association impose sanctions for the breach of the code, the code aims to provide guidelines for compliance with article 4.2.2. of the corporate governance *Kodex*, which entails that businesses may issue a statement of compliance or non-compliance under article 161 AktG.[426]

- The criteria established by the association and the International Centre for Franchising und Cooperation required by the German Franchise Association, Deutscher Franchise-Verband e. V ('DFV').[427]

- The codes of conduct of the Resort Development Organisation ('RDO').[428] Its code of ethics provides that members may be excluded for breach of the code. However, the duties imposed by the code are very general and do not go beyond the legal

[419] Available at http://www.fpsb.de/files/documents/Satzung_FPSB110617_formatiert1.pdf.
[420] See http://www.fifa.de/ - this website seems currently under construction (June 2012).
[421] Buck-Heeb & Dieckmann 2010, p. 111.
[422] Augsberg 2001, p. 249.
[423] See http://www.gcfas.de/about/. Unfortunately, the code of conduct does not seem to be publicly available.
[424] Available at http://www.vuvb.de/assets/Uploads/Kodex-fuer-unabhaengige-Verguetungsberatung.pdf.
[425] Available at http://www.vuvb.de/assets/Uploads/Satzung.pdf. As the code has only been recently established, it can be doubted whether it may already be held to reflect established business practices.
[426] See further par. ...
[427] See further http://www.franchiseverband.com/deutscher-franchise-verband-ev.html. The German Franchise Association is a member of the European Franchise Federation (EFF) has established a European code of ethics for franchising, available at http://www.eff-franchise.com/spip.php?rubrique13.
[428] See http://www.rdo.org/public_files/rdo_code_adr_scheme_09.pdf. The RDO used to be the Organisation for Timeshare in Europe ('OTE').

obligations. It does have a German 'chapter',[429] but there do not seem to be German members.[430]

- The fractional & shared ownership[431] trade association ('FSOTA') apparently also requires that members comply with its code of conduct,[432] the text of which however currently does not seem to be publicly available. It is also unclear whether this association has German members.

- The codes of conduct from the federal association for German auctioneers ('*Bundesverband deutschen Kunstversteigerer*', 'BDK') and the separate code for international trade in art,[433] stating that its members recognise these codes as binding, and that 'serious' breaches of the code,[434] if sufficiently proven, will be considered as breaches of decisions from the association under article 2 par. 7 of the articles of association, which may justify exclusion. At first sight, the codes do not seem to go far beyond what is already contractually, if not legally required.[435]

- The code of conduct,[436] of the federal association for German trade in art and antiquity ('*Bundesverband des deutschen Kunst- und Antiqitätenhandelns e.V.*', '*BDKA*') has also established a which partially overlaps with the code of conduct for international trade of the BDK. Although article 7 of the code stipulates that member associations will impose the code on their members, it is not clear whether the code is established on the basis of the articles of association of the BDKA and the code itself imposes no sanction on breaches of the code.

Thus, various codes on professional conduct have been established, but the strictness of these rules and their enforcement depend on the drafters of the codes. Accordingly, the code for insolvency administrators and auditors are more strict than codes for organisations in the financial sector, the timeshare business and art trade.

4.5.2.4. The Pressekodex

The *Pressekodex* has been drafted by the German Press Council ('*Deutscher Presserat*') in 1972, after a two-year consultation period to ensure that the code was in accordance with the views of relevant stakeholders, and it reflects professional ethical standards, which may be complemented and amended by guidelines.[437] Article 9 of the articles of association[438] makes clear that the *Presserat* is competent to decide on complaints in general, without a declaration of compliance and article 10 par. 2 adds that members shall be bound to the *Pressekodex* and promote compliance with the *Kodex*. However, it can be doubted whether sanctions can be directly enforced on the basis of the *Presserat*'s articles of association.

[429] See http://www.rdo.org/Chapters/Germany.htm.
[430] See http://www.rdo.org/Members/Members-List.htm.
[431] Fractional and shared ownership is described as a "direct" interest in a 'luxury property' (not only real estate, but also yachts, cars or jets) for periods of a year (based on rotation or fixed periods) that do not necessarily fall within article 2 Directive 94/47 on timeshare, but that do fall within Directive 2008/122 on timeshare.
[432] See http://www.rdo.org/news-items/83.aspx.
[433] Both codes are available at http://service.kunstversteigerer.de/de/t/kodex/.
[434] For international trade, breaches also have to be 'durable'.
[435] For example, article 3 states that separate property will be be indicated as such.
[436] Available at http://www.bdka.de/de/id150.htm.
[437] See http://www.presserat.info/inhalt/der-pressekodex/pressekodex/richtlinien-zu-ziffer-1.html.
[438] Available at http://www.presserat.info/inhalt/der-presserat/statuten/satzung.html.

Notably, the federal associations in this area are members of the *Presserat*, the publishing houses and journalists against whom the complaints can be directed are not. Indirectly, they are members of the state organizations and unions, which, in turn, are members of these federal associations that are members of the *Presserat*. However, the possibility of these federal organizations to enforce sanctions of the *Presserat* requires an explicit provision in the articles of association of those organisations,[439] which is lacking.[440] Dietrich[441] finds that sanctions can also not be based on the obligation of loyalty of members towards the association ('*Treuepflicht*'). She finds that in this respect, the obligation to print a reprimand can only be enforced if not doing so would make pursuing the aim of the association pointless, which will hardly be the case. Also, the aim of the federal associations should be distinguished from the aims of the *Presserat*, which means that members' duty to cooperate does not necessarily entail cooperation to publish a complaint. Article 10 of the articles of association of the *Presserat* seems to recognize this lack to enforce sanctions on the basis of the articles of association by requiring a declaration of compliance by publishing houses in the area of the press that they comply with the code. It has been estimated that around 90 % of relevant stakeholders has issued a declaration of compliance.[442] Consequently, the declaration of compliance may entail a contractual duty of publishing houses to comply with the *Kodex*.

4.5.2.5. The Werbekodex

The German Advertising Standards Council ('*Deutscher Werberat*'), consisting of members of the German framework organisation for advertising branches ('*Zentralverband der deutschen Werbewirtschaft*', 'ZAW'), has developed a code of conduct[443] that enables it to cope with undesirable practices and so-called 'grey areas' before the legislator intervenes. The sanctions that can be imposed by the *Werberat* range from withdrawal or amendments to advertising or a public reprimand.[444] Ruess[445] points out that the *Werberat* does not involve determining whether advertising is in accordance with the law – for example whether it is misleading – but rather whether advertising is in accordance with generally accepted standards in society.[446] This code is in accordance with article 2 of the articles of association of the ZAW. However, the ZAW is an overarching organisation, and the organisations that should comply with the code are not directly bound on the basis of their membership. It is unclear whether they are indirectly bound, or whether an express possibility to impose sanctions is included in the articles of association of organisations that they are a member of.[447] According to the *Werberat*, compliance with its judgments is generally high,[448] while it

[439] MunchKomm zum BGB/Reuter, article 25, nr 44.
[440] Comp. thearticles of association of the members of the Presserat: the Federation of German Newspaper Publishers, ('*Bundesverband Deutscher Zeitungsverleger e.V.*', 'BDVZ', http://www.bdzv.de/ueber-den-bdzv/satzung/), the Organisaiton of German Magazine Publishers ('*Verband Deutscher Zeitschriftenverleger*', 'VDZ', at http://www.vdz.de/ueber-den-vdz-satzung/), the Association of German Journalists, ('*Deutsche Journalisten Verband*', 'DJV', at http://www.djv.de/fileadmin/DJV/DJV/Satzung_2009-2010.pdf), and the German Journalists Union ('*Deutsche Journalistinnen-und Journalisten-Union*', 'dju', in Ver.di, at http://dju.verdi.de/ueber_die_dju/selbstdarstellung/geschaeftsordnung,
[441] N. Dietrich, *Der Deutsche Presserat*, 2002, p. 55, 57-58, .
[442] Spindler/Schuster, *Recht der elektronischen Medien* (2011), article 41 Bundesdatenschutzgesetz, nr 130.
[443] Available at http://www.werberat.de/.
[444] See http://www.werberat.de/content/Sanktionen.php.
[445] P. Ruess, *Jahrbuch Junger Zivilrechtswissenshcaftlicher 2002*, p. 217. See critically U. Di Fabio, 'Selbstverpflichtungen der Wirtschaft – Grenzgänger zwischen Freiheit und Zwang', *JZ* 1997, p. 971.
[446] The Werberat refers to the '*Werbemoral*': V. Nickel, 'Wie uberfluessig ist Werbemoral?', Report ZWA for the meeting of the Austrian Werberat2011, at http://zaw.de/doc/Werbemoral_Wien.pdf.
[447] Unfortunately, the articles of association of the ZAW do not seem ot be publicly available. Members of the ZAW also do not clearly and consistently provide for the enforcement of the code of conduct from the *Werberat* in their articles of association: see for an overview of members http://www.zaw.de/index.php?menuid=87.

states that its standards are also more strict than generally applied by the judiciary.[449] Since 2010, the *Werberat* offers a confidential procedure in which businesses and agencies have the possibility to submit a commercial to the *Werberat* before it is made public.[450]

4.5.2.6. The role of non-state actors

Generally, the role of non-state actors is prominent as the autonomy of associations ('*Vereinsautonomie*') is protected under article 9 GG and article 40 BGB,[451] and it entails that members have the freedom to form the association in accordance with their preferences, within the confines of the law. Accordingly, organisations may bind their members through their articles of association. The *Vereinsautonomie* does however not justify the binding effects of rules established on the basis of the articles of association on non-members.[452]

Moreover, codes may also concern members' consitutional rights: the *Pressekodex* may affect the right to free speech under article 5 GG, and the freedom of profession under article 12 GG. Similarly, professional codes of conduct and sports' codes may affect member's rights under article 12 GG. These constitutional rights have prompted the German legislator to exercise restraint,[453] which was maintained in the implementation of Directive 95/46 on data protection, which in article 27 explicitly refers to self-regulation,[454] Directive 2003/6 on market abuse,[455] and Directive 2003/125.[456]

The role of non-actors depends on the content of the code, and the scope and influence of these rules. Whereas the scope of internally binding codes may be limited, especially if it concerns small businesses, the scope and influence of sports' organisations' codes and professional codes may be considerable.

Sports' associations are generally considered socially influential.[457] The special expertise of sports' associations provides these associations with a considerable amount of discretion in the evaluation of the behaviour of athletes that should be taken into account by the judiciary. Accordingly, sports' associations' rules can be used for the interpretation of blanket clauses.[458] Non-members who have not submitted to sports' rules may also be bound to sports' rules as they have implicitly agreed to sports' rules.[459] Moreover, most states, including Germany, leave substantial room for a choice of law and forum in these matters. Consequently, these matters are subject to the *lex sportiva* and supervised by international arbitration.[460]

Typically, professional codes have a wide scope, affecting particular gorups of professionals. Codes may also affect the view of third parties of a particular profession and

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[448] V. Nickel, 'Report ZWA for the meeting of the Austrian Werberat 2011, p. 10, as well as http://www.werberat.de/content/Durchsetzungsquote.php.
[449] V. Nickel, Report ZWA for the meeting of the Austrian Werberat 2011, p. 21.
[450] V. Nickel, Report ZWA for the meeting of the Austrian Werberat 2011, p. 22.
[451] MunchKomm zum BGB/Reuter (2012) article 40, nr 3.
[452] BVerfG 12 October 1995, *NJW* 1996, 1203.
[453] N. Dietrich, *Der Deutsche Presserat*, 2002, p. 10-12.
[454] The question whether Directives can be implemented through self-regulation is controversial; see further Spindler/Schuster, *Recht der elektronischen Medien* (2011), article 41 Bundesdatenschutzgesetz, nr 126-132.
[455] See for the position of the *Presserat* on the implementation of this Directive http://www.presserat.info/fileadmin/download/Stellungsnahme_AnSVG.pdf.
[456] Notably, article 34 par. 4 WpHG, which implements part of the Directive, stipulating that journalists are excepted from pars. 1, 2 and 5 if they are subject to self-regulation similar to these paragraphs and to article 34c WpHG, which should also include a clear enforcement mechanism.
[457] Buck-Heeb & Dieckmann 2010, p. 70.
[458] See for example BGH 11 January 1972, *NJW* 1972, 627.
[459] BGH 28 November 1994, *NJW* 1995, 583. This may also include audiences; see for example article t82.3 of the FIE, http://www.britishfencing.com/uploads/files/book_t_23:04.pdf.
[460] Cmp. MunchKomm zum BGB/Reuter (2012) article 25, nr 62 on possible problems if sports' rules diverge from national mandatory law

accordingly affect rules for contracting with third parties. More generally, the rights of third parties may be influenced as professional behaviour is more clearly outlined. The public interest in the proper functioning of officials is clearly recognised in areas where *Kammern* have been established or where membership of a particular organisation, or adherence to a particular code, is not really optional.

The European legislator has left less room to private actors as it has shown less restraint in replacing self-regulation with legislation. Accordingly, the European legislator rejected self-regulation on market practices as it did not provide a viable alternative to "traditional" Directives.[461] Particularly, the European legislator sought to establish mandatory standard.[462] Although a possibility for co-regulation was considered, it remains unclear to what extent the rules established by self-regulation have played a role in the drafting of Directive 2005/29.[463]

Also, the CJEU has clearly indicated that the use of self-regulation to implement Directives is problematic, because it has no binding effect.[464] Accordingly, questions of sufficient enforcement have arisen with regard to the implementation of Directive 2003/125 through the additional guideline 7.4 for the coverage of money market reports of 24 March 2006.[465] The normal sanctions of breach of the *Pressekodex* may entail a reprimand, which can be published, the disapproval of the *Presserat* or an instruction.[466] Notably, the *Presserat* is not competent to impose compensation and cannot prohibit publication or order rectification.[467] However, an upheld complaint – especially a published reprimand – may have further consequences for journalists acting against professional ethics if associations at the state or regional level of which journalists are a member, or their employers, may take the decisions of the *Presserat* into account.[468] In addition, the rules provided by the *Presserat* may serve as a realization of blanket clauses.[469]

Thus, the role of non-state actors at the national level is protected by constitutional rights. Especially sports' organisations and organisations that provide strict professional rules have an influentual role.

4.5.2.7. Limitations to non-state actors' roles

Articles of associations are a mixed form of self-regulation:[470] on the one hand, the founders establish an organisation through a contract; on the other hand, once the organisation has

[461] Institut für Europäisches Wirtschafts und Verbraucherrecht, *Study on the feasibility for a general legislative framework on fair trading*. Executive summary, chapter VI, available at http://ec.europa.eu/consumers/rights/studies_reports_en.htm.
[462] T.W. Reader, 'Is self-regulation the best option for the advertising industry in the European Union? An argument for the harmonization of advertising laws through the continued use of Directives, 16 *U. Pa. Int'l Bus. L.* (1995-1996) p. 210 et seq, points out that self-regulation is an inefficient method of harmonisation as Member State scan simply ignore EU-wide self-regulatory standards at a national level. He suggests that advertising industry should be involved in the drafting of Directives, and that self-regulation at a European level could be reinforced as Directives. See more cautiously B. Schmitz, 'Advertising and commercial Communications – Towards a coherent and effective EC policy', *Journal of Consumer Policy* 1993, p. 407-408.
[463] Directive 2006/114 applies in business-to-business situations, and refers indirectly to misleading advertising towards consumers, whereas Directive 2005/29 and most codes of conduct target aggressive or misleading advertising towards consumers.
[464] CJEU 19 October 1987 (Commission v The Netherlands), case 236/85, [1987] ECR, p. 3989.
[465] T.M.J. Möllers, 'Effizienz als Maßstab des Kapitalmarktrechts', *AcP* 2008, p. 21, See affirmatively J.A. Kämmerer, R. Veil, 'Analyse von Finanzinstrumenten (§ 34b WpHG) und journalistische Selbstregulierung', *BKR* 2005, p. 383. Buck-Heeb & Dieckmann 2010 p. 106 note that an additional code of conduct, the *Kodex für anlegergerechte Kapitalmarktinformation*, does not play a prominent role for self-regulation for journalists.
[466] See http://www.presserat.info/inhalt/beschwerde/anleitung.html.
[467] See further on these issues Damm/Rehbock, *Widerruf, Unterlassung und Schadenersatz in den Medien*, (2008).
[468] See in further detail on this question N. Dietrich, *Der Deutsche Presserat*, 2002, p. 64 et seq.
[469] N. Dietrich, *Der Deutsche Presserat*, p. 96-97.
[470] See further Buck-Heeb & Dieckmann 2010, p. 55 et seq. Confusingly, despite the use of articles of association that enable organisations to impose rules on their members, questions may still arise as to the basis of the binding effect of rules based on organisations' articles of association. See for example Augsberg 2001, p. 245.

been established, it is considered a legal person that can create rights and duties for other legal persons. Taupitz[471] emphasises the difference between a contract and membership of an association; by becoming a member of an association, that member enters a community where rules have already been established ('*fertige Rechtsordnung*'). As articles of association impose rules on private parties that have typically not been an object of negotiations between parties, *Fremdbestimmung* may arise. Importantly, however, this problem does not arise if codes do not have binding force or if sanctions on the breach of codes have not been established. Thus, agreements to establish associations and articles of associations may not fall within the scope of the *Richtigkeitsgewähr*, although this need not be absent in all cases.[472]

The possibility of *Fremdbestimmung* does not necessarily give rise to control mechanisms as these mechanisms simultaneously limit parties' constitutional rights. Generally, judicial control may be difficult to reconcile with the *Vereinsautonomie*. Judicial control should thus be considered as an exception, which may only take place with regard to rules established by associations that are irreconcilable with general principles ('*Körperschäftlichen Prinzipien*'),[473] or where organisations have a socially or economically influential role.[474] The standard established by article 242 BGB is taken as a starting point to evaluate whether the rules established by the association are unfairly to the advantage of the association.[475]

Similarly, professional codes of conduct are developed against the background of article 12 GG and may simultaneously lead to *Fremdbestimmung*. It is unclear whether judicial evaluation would be problematic under article 12 GG. In the area of advertising, article 1 UWG provides a clear basis for judicial evaluation. However, when determining whether advertising is unfair in the sense of article 1 UWG, restraint should be adopted in limiting advertisers' freedom of speech by banning advertising.[476]

However, self-regulation developed against the background of drafters' constitutional rights may simultaneously affect third parties' constitutional rights. Organisations must be careful that they do not infringe on third parties' rights to freely decide their profession, in accordance with the *Stufentheorie* established by the BVerfG. The controversy of self-regulation in areas affecting constitutional rights becomes clear when considering the area of advertising, where it has been argued that these issues should be dealt with by the law, [477] especially as advertising may fall within the scope of article 5 GG.[478]

German state actors have imposed limitations on the role of respectively adverisers, but especially sports' organisations.

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[471] Taupitz 1991, p. 562.
[472] MunchKomm zum BGB/Reuter (2012), introduction to articles 21 -54, nr 120. Similarly, L. Fastrich, *Richterliche Inhaltskontrolle im Privatrecht*, Beck: München 1992, p. 137 raises doubts whether subjection to the articles of association of a GmbH is subject to judicial control, despite previous legal counsel and form requirements. G. Bachmann, *Private Ordnung*, p. 311-312 argues that problems of *Fremdbestimmung* may be resolved if members of associations have a right to cancel their membership, thus avoiding being bound to a rule they did not negotiate and that is not in their interest.
[473] L. Fastrich, *Richterliche Inhaltskontrolle im Privatrecht*, Beck: München 1992, p. 138. This is for example the case where mandatory law does not safeguard that unfair burdens can be imposed on persons becoming members of, for example, *Publikumspersonsgesellschaften*, see BGH 14 April 1975, *NJW* 1975, 1318.
[474] Loosschelders/Staudinger (2012) article 242 nr 480.
[475] BGH 24 October 1988, *NJW* 1989, 1724.
[476] BVerfG 12 December 2000 - 1 BvR 1762/95 u. 1787/95, *NJW* 2001, 591, followed by BGH 6 December 2001, *NJW* 2002, 1200 which still banned the adverts from Benetton.
[477] See in favour K.-H. Fezer, 'Diskrimierende Werbung - Das Menschenbild der Verfassung', *JZ* 1998, p. 265 et seq. See against P. Ruess, 'Das Recht der Werbung zwischen Staats- und Selbstkontrolle', in: C.-H. Witt et al (eds.), *Die Privatisierung des Privatrechts – rechtliche Gestaltung ohne staatlichen Zwang, Jahrbuch Junger Zivilrechtswissenshcaftlicher 2002*, Boorberg: Stuttgart 2002, p. 219
[478] See for example BVerfG 12 December 2000, *NJW* 2001, 591

In the area of advertising, the UWG and blanket clauses in the BGB may well contribute to limiting unfair or misleading advertising.[479] and courts have accordingly subjected advertising to judicial evaluation.[480]

The role of sports associations have also been subjected to limitations:

1) Sports' associations rules against members with regard to the association (requirements for membership, contributions etc) are subject to judicial evaluation.[481] Similarly, penalty clauses in employment contracts with athletes are subjected to evaluation under articles 305-310 BGB.[482]

2) The binding effect of rules developed by transnational sports' organisations is limited by objections to dynamic referral to these transnational organisations in the articles or association. Dynamic referral is not reconcilable with article 71 BGB that sets requirements for the amendments of articles of association, and as it entails an unacceptable delegation of members' decision-making to other institutions.[483]

3) As the BGH[484] has rejected dynamic referral of sports' associations' articles of associations, which was previously much used,[485] associations have to limit themselves to static referral, necessitating regular updates as articles of associations are revised. Heerman[486] points out that this option may be problematic, especially as the number of sports supervised by an association continues, as it is difficult for overarching organisations to respond adequately to developing practices and to ensure that the rules developed as a response to these practices are adequately implemented by local organisations, which is a requirements for their binding force on individual members.

4) Rules that may bind third parties who have implicitly agreed on these rules are subjected to judicial evaluation under article 242 BGB.[487]

European actors have shown less restraint in limiting the role of non-state actors, and consistent control mechanisms to limit the role the effects of self-regulation based on articles of association have not developed for that reason. However, the role of non-state actors may be limited by European law as self-regulation has not withheld the European legislator from establishing legislation. Yet simultaneously, the European legislator has sought to reinforce existing self-regulation.

[479] BVerfG 12 December 2000, *NJW* 2001, 591, par. 3 under b.
[480] Less restraint has been adopted in the area of advertising, which also falls within the scope of article 5 GG, comp. BVerfG 12 December 2000 - 1 BvR 1762/95 u. 1787/95, *NJW* 2001, 591. See further J. Kübler, F. Kübler, 'Werbefreiheit nach "Benetton"', in: FS Ulmer, p. 918 et seq.
[481] Buck-Heeb & Dieckmann 2010, p. 69.
[482] MunchKomm zum BGB/Gottwald (2012), introduction to articles 336-345, nr 14.
[483] G. Bachmann, *Private Ordnung*, p. 309.
[484] BGH 28.11.1994, II ZR 11/94, *NJW* 1995, 583.
[485] K. Vieweg, *Normsetzung und -anwendung deutscher und internationaler Verbände*, 1990, p. 72, considering the permissibility of this practice at p. 346-347.
[486] G. Heerman, 'Die Geltung von Verbandssatzungen gegenüber mittelbaren Mitgliedern und Nichtmitgliedern', *NZG* 1999, p. 326, who also further analyses the different ways in which athletes can be bound to sports rules.
[487] Vieweg 1990, p. 326-327 has argued that these rules can also be characterised as STC's and should therefore be subject to judicial control under article 307 BGB. This characterisation does not seem convincing; it can be doubted whether sports' rules are included in an implicit contract by the behaviour of individuals under article 305 BGB.

4.5.2.8. Comparison

Various similarities but especially differenfes become apparent in the development of self-regulation on the basis of articles of association at the national and European level.

Non-state actors have developed self-regulation both at the national level and beyond the national level, but self-regulation is much more developed at the national level. Possibly, this development can be attributed to the development of this form of self-regulation within the law on articles of association, often company law. Possibly, as European forms of organisations are established, more self-regulation on the basis of articles of association will be established at the European level.

The development of control mechanisms that limit potential *Fremdbestimmung* is less visible at the European level as this form of self-regulation is generally not recognised as a separate category that may give rise to *Fremdbestimmung*.

Also, the development of this form of self-regulation is not seen against the background of constitutional rights at the European level and the European legislator has shown less restraint in establishing legislation in areas where well-established, apparently successful self-regulation already exists.

4.5.2.9. Conclusion on self-regulation on the basis of articles of association

Especially at the national level, extensive amounts of self-regulation have been developed, and non-state actors may play an important role, depending on the content of codes and the scope and influence of the rules, which varies considerably. German actors have used various control mechanisms to limit potential *Fremdbestimmung*. Judicial evaluation has been prominently used, while the extent to which actors can develop rules that interfere with constitutional rights has been expressly limited and the possibility to make use of dynamic referral has been banned. Moreover, mandatory law has been established.

The role of non-state actors is subject to limitations established by both national and European state actors. However, European actors have not developed control mechanisms to limit the role of non-state actors that have developed self-regulation on the basis of articles of association; instead, European actors have shown less restraint in interfering in areas where self-regulation has already been established. This development may draw attention to the diminished ability of German actors to independently ensure that self-regulation that has been developed in the context of constitutional rights will not be replaced by legislation. Thus, interdependence has developed.

4.5.3. One-sided juridical acts

What role have non-state actors played in the development of private law through self-regulation based on non-binding one-sided juridical acts?

Paragraphs 4.5.3.1.-4.5.3.4. will consider instances of various forms of voluntary self-regulation, [488] ranging from instances of self-regulation sanctioned by the legislator (the *Nachhaltigkeitskodex* and the *BVI-Verhaltensregeln*), self-regulation that may or may not be binding on a contractual basis (the initiative to establish a simple payment account for everyone, '*Ein Girokonto für jedermann!*'), and codes of conduct that are one-sided juridical acts (codes and trustmarks for consumer sales). Paragraph 4.5.3.5. will discuss the role of

[488] Voluntary self-regulaiton has often beenr eferred to as codes of conduct. Article 2 par. 1 sub 5 UWG implements the definition of a code of conduct form article 2 sub f Directive 2005/29 on unfair commercial practices. However, in German law there is some controversy with regard to this definition, see Buck-Heeb & Dieckmann 2010, p. 12.

non-state actors and paragraph 4.5.3.6. will consider limitations to the role of non-state actors through the development of control mechanisms. Paragraph 4.5.3.7. will provide a comparison and paragraph 4.5.3.8. will end with a conclusion.

4.5.3.1. Encouraging codes to complement hard law: corporate social responsibility

The German code on social corporate responsibility ('*Nachhaltigkeitskodex*') [489] was developed by the council for sustainable development ('*Rat für Nachhaltige Entwicklung*', 'RNE'), which was appointed by the government to work on "sustainability".[490] Initially, the idea was to model the *Nachhaltigkeitskodex* after the corporate governance *Kodex*, including a provision similar to article 161 AktG, which would oblige businesses to make a declaration on their compliance with the code which subsequently could be a basis for liability. The code was developed in cooperation with relevant stakeholders,[491] and it provides businesses with uniform standards on providing information with regard to sustainability, which should increase the credibility of businesses' statements in this regard. Interestingly, the RNE wishes to play a leading role on the development of codes in the area of sustainability at the European and international level, and has accordingly addressed international organisations and provided translations of the code.[492] The RNE has collected declarations of compliance with the code,[493] which shall be evaluated in 2013.[494]

4.5.3.2. Lack of interference because of self-regulation: the BVI-Verhaltensregeln

The BVI-Verhaltensregeln[495] were drafted in 2002 and entered into force 2003, drafted by Bundesverband Investment und Asset Management e.V. ('BVI'). In 2005, an expert group developed the Corporate Governance-Kodex für Asset Management Gesellschaften, which has been merged in the *Verhaltensregeln*. [496] Attempts to establish an independent expert commission to establish a code, taking into account the *Verhaltensregeln* while also expressing more strongly the interests of investors failed because of resistance of the BVI.[497] The BaFin[498] has stated that in the interpretation of article 9 par 5 law on investments, (*Investmentgesetz*, 'InvG'), it will take the newly developed rules by the BVI as a starting point.[499] An additional part of the code aims to reinforce the responsibility of professionals, beyond legal requirements. The competence of the BVI to establish codes of conduct has not been expressly established in the articles of association of the BVI,[500] but article 3 par. 1 sub 4 of the articles of association stipulates that the BVI aims to provide information on private equity and asset management. The question arises whether the code can be seen in this light, and what this would mean for the effect of the code – may it impose binding rules on members under this article or not? In addition, the *Verhaltensregeln* do not provide for a

[489] Available at http://www.nachhaltigkeitsrat.de/de/dokumente/?size=nxw...
[490] See further http://www.nachhaltigkeitsrat.de/de/der-rat/.
[491] See the overview at http://www.nachhaltigkeitsrat.de/deutscher-nachhaltigkeitskodex.
[492] RNE, *Der Deutsche Nachhaltigketiskodex*, version of January 2012, p. 4.
[493] See the overview at http://www.nachhaltigkeitsrat.de/projekte/eigene-projekte/deutscher-nachhaltigkeitskodex/?subid=6690&cHash=41c117e7ec, see also the model declaration of compliance.
[494] RNE, *Der Deutsche Nachhaltigketiskodex*, version of January 2012, p. 4.
[495] Available at http://www.bvi.de/de/bvi/leitlinien_standards/wohlverhaltensregeln/download/wohlverhaltensregeln.pdf.
[496] Schimansky/Bunte/Lwowski/*Bankrechts-Handbuch*/Köndgen/Schmiess (2011), article 113, nr 34 .
[497] Köndgen 2006, p. 498.
[498] Statement of 20 January 2010, WA 41 - Wp2136 - 2008/0009 , http://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Auslegungsentscheidung/WA/ae_100120_wohlverhaltensregelnbvi.html?nn=2798666.
[499] Interestingly, the BVI characterises this use of the code as a '*Allgemeinverbindlichkeitserklärung*'.
[500] Available at http://www.bvi.de/de/bvi/download/bvi_satzung_2010.pdf.

sanction of the breach of the code. The articles of association similarly do not provide for the possibility to impose sanctions, although article 5, par. 1 sub 2 of the articles stipulate that members can be excluded from the BVI if they have acted against the interests of the BVI, and have not ceased their behaviour despite repeated warnings from the BVI. It can however be doubted whether breach of the *Verhaltensregeln* will necessarily amount to behaviour against the interests of the BVI – only behaviour that breaches the code and that also damages the reputation of private equity and asset management to such an extent that pursuing the aim of the BVI becomes pointless. However, since July 2011, arbitration boards have been established for the settlement of disputes in consumer cases, which has been delegated to the the Ombudsstelle für Investmentfonds des BVI, under article 134c par. 6 InvG and the *Investmentschlichtungstelleverordnung* established under this article.[501]

4.5.3.3. Border cases: Binding one-sided declarations?

The German Association of Creditors ('*Deutsche Kreditwirtschaft*', 'DK', previously '*Zentrale Kreditauschuss*'),[502] which represents associations for banks and other institutions extending credit, has established a recommendation to provide a simple payment account for everyone ('*Girokonto für Jedermann*').[503]

It has been doubted whether the recommendation has any binding force, either externally or internally.[504] It is unclear whether the articles of association of the DK contain the competence to establish a recommendation, and the recommendation itself establishes no sanction for acting against it. However, even if this recommendation would be based on the articles of association, it would only be binding upon the members of the DK, which in turn are representatives of banks and other institutions providing credit.[505]

The question arises the recommendation amounts to an offer in the sense of article 145 BGB, or a recognition of an obligation for the benefit of third parties ('*Schuldversprechen*' or '*Vertrag zugunsten Dritter*') in the sense of articles 780 and 328 BGB. There is some confusion on this question. The OLG Bremen[506] followed by the LG Berlin,[507] has held that the recommendation is made by the DK, who is not competent to enter into contracts, or to offer to do so, on behalf of its members.[508] Moreover, it concerns a recommendation, which has been established to avoid a legal obligation to contract, and can thus not be held to constitute an offer, as there is no intention to be legally bound. Thus, an average client could not interpret this recommendation as an offer. It was moreover also held that the offer was too abstract to constitute a valid offer. In a 2008 decision,[509] which was not followed in a subsequent decision in 2008,[510] the LG Berlin held that without a simple payment account, participation in trade was not possible. Consequently, article 2 GG would entail an obligation to contract. Interestingly, a clear statement of compliance with the recommendation to a

[501] See for an overview of participating businesses http://www.ombudsstelle-investmentfonds.de/ombudsstelleDocs/verzeichnis_schlichtungsstellen.pdf.
[502] See http://www.die-deutsche-kreditwirtschaft.de/dk/die-deutsche-kreditwirtschaft.html.
[503] Available at http://www.die-deutsche-kreditwirtschaft.de/die-deutsche-kreditwirtschaft/kontofuehrung/konto-fuer-jedermann/empfehlung.html.
[504] M. Geschwandtener, R. Bornemann, 'Girokonto für jedermann - Vertragsabschlussfreiheit, Selbstregulierung oder gesetzlicher Zwang?', *NJW* 2007, p. 1254 even consider the recommendation a 'Nullum'.
[505] Bericht der Bundesregierung zur Umsetzung der Empfehlungen des Zentralen Kreditausschusses zum Girokonto für jedermann, 27 December 2011, BT-Drucks. 17/8312, p. 3 notes that in some *Länder*, the articles of association have incorporated this aim
[506] OLG Bremen 22.12.2005, *BKR* 2006, 294.
[507] LG Berlin 12.08.2008, *BeckRS* 2009, 06446.
[508] Buck-Heeb & Dieckmann 2010, p. 120.
[509] LG Berlin 8.5.2008, *BeckRS* 2008, 10013.
[510] LG Berlin 12.08.2008, *BeckRS* 2009, 06446.

senate may also give a customer a direct claim for a simple payment account.[511] Alternatively, Bachmann[512] has held that in rare cases, non-compliance with the promise to provide all individuals with a bank account may lead to liability under article 242 BGB, if expectations have been created that the code would be complied with ('*Erwirkung*').[513]

4.5.3.4. General declarations: consumer services

Trustmarks or certificates with regard to consumer services have been established.[514] Various trustmarks, accompanied by quality standards, have been established in the area of consumer sales. Prominent trustmarks[515] are

- The trustmark '*Geprüfter online shop – Bundesverband des Deutschen versandhandlers*',[516] established by the German e-commerce and distance selling trade association ('*Bundesverband des Deutschen Versandhandlers*'),[517] in cooperation with EHI Retail Institute,[518]

- The trust mark for online shopping[519] established by S@fer Shopping,[520]

- The trust mark for online shopping[521] established by Trusted Shops.[522]

Interestingly, Trusted Shops has established contracts with its and participants, and the question arises whether these contracts can be qualified as contracts to the benefit of third parties in the sense of article 328 BGB, which would also provide consumers with a direct remedy in cases of breach of this contract.[523] Article 7 in this contract provides that if there is no direct contract between Trusted Shops and the consumer, but Trusted Shops is involved in the conclusion of the contract as an intermediary, it will ensure that the contract party of the consumer complies with articles 2-5 of his contract with Trusted Shops. However, in cases where Trusted Shops is not involved as an intermediary, the question arises whether

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[511] LG Berlin 24 April 2003, *BKR* 2004, 127.
[512] G. Bachmann, *Private Ordnung*, p. 279.
[513] See further MunchKomm BGB Roth/Schubert (2012) article 242 nr 388.
[514] Interestingly, offerors of certificates and trustmarks claim that trustmarks and certificates play a central role in the decision-making of consumers as it increases consumer confidence see the summary of research from TNS Infratest, Online-Gütesiegel, Berlin, 19 August 2005, available at http://www.trustedshops.de/shopbetreiber/pdf_download/tnsinfratest_studie.pdf, commissioned by D21. The complete study is unfortunately not available at the website of TNS Infratest (http://www.tns-infratest.com/). See also http://www.trustedshops.de/shopbetreiber/pdf_download/Studien-und-Umfragen.pdf.
[515] Other trustmarks have been found to lack, for example, regular monioring or monitoring of important issues such as for example clear sanctions. These trustmarks include Chip/Xonio Online-Shop Zertifikat, for shops particpating in price comparisons, see further http://www.chip.de/cxo/Die-Shop-Zertifizierung-2_10870164.html, and BoniCert, see for the requirements http://www.bonicert.de/files/BC-Quali_v2.0.pdf, as well as *Das Internetsiegel*, see for the requirements http://www.internetsiegel.net/Pruefungskriterien.pdf. Groupon Germany also offers participating businesses a trustrmark, the Groupon Gütesiegel, which it awards to a limited number of businesses providing good services, see further http://www.groupon.de/internetsiegel. It is however unclear how this trustmark is awarded, on what grounds, and whether companies in fact display the trustmark.
[516] See http://www.bvh.info/bvh/leistungen/guetesiegel/?no_cache=1&sword_list[0]=g%C3%BCtesiegel.
[517] See http://www.bvh.info/bvh/. The BVH is also an EMOTA member.
[518] See http://www.ehi.org/en/about-us.html. The quality standards of the EHI are available at http://www.shopinfo.net/haendler/kriterien/index.html.
[519] The requirements established by S@fer Shopping are available at http://www.safer-shopping.de/qualitaetskriterien.html.
[520] See http://www.safer-shopping.de/.
[521] See further http://www.trustedshops.de/guetesiegel/kaeuferschutz.html. The quality criteria that have to be met by members, as well as model STC's, are available at http://www.trustedshops.de/shopbetreiber/download.html. Breach of the standards prescribed by Trusted Shops can be sanctioned by a fine and by exclusion and publication of sanctions, in accordance with the contractual provisions between Trusted Shops and its members, see http://www.trustedshops.de/shopbetreiber/pdf_download/TS-Vertragsbedingungen.pdf. An overview of German trustmarks is also provided by the Global Business Dialogue on e-Society at http://www.gbd-e.org/ig/cc/TMorg_1212_EN_EU.pdf.
[522] See http://www.trustedshops.de/shopbetreiber/unternehmen.html.
[523] MunchKomm zum BGB/Gottwald (2012) article 328 nr 3.

the contract can be interpreted as a contract for the benefit of third parties, in accordance with article 328 par. 2 BGB, which stipulates that this should be derived from the circumstances and the aim of the contract. In this case, it seems that the aim of the contract is to increase consumers' trust in a particular seller by the use of a trust mark by ensuring correct behaviour towards consumers.

In turn, these trust marks have been recognised as meeting the requirements[524] established by Initiative D21,[525] a cooperation between selling associations. Although statements of compliance constitute a non-binding, one-sided juridical act, the associations recognised by D21 typically enforce compliance with these codes through contracts with members.[526]

Initiatives have also been established at the European level:

- The Euro-Label, a European-wide internet trust mark, awarded to members who comply with the accompanying European code of conduct, developed by stakeholders with support from the European Commission, does however not refer to D21 but to the EHI-Retail Institute.[527]

- The European Trade Association representing e-commerce and mail-order (EMOTA) which has developed a the European convention on cross-border mail order and distance selling[528] that members are required to recognise. The BVH is a member of EMOTA.

- The Federation for direct selling in Europe ('FEDSA')[529] that has established codes of conduct both towards consumers and towards other direct sellers. It states that members are not directly bound by the codes; instead, the code is provided to (national) direct selling associations, which may, in turn, require members to comply to the code.

Thus, non-state actors have made liberal use of possibilities to establish voluntary self-regulation.

4.5.3.5. The roles of non-state actors

Article 2 GG and default law leave non-state actors with a large amount of freedom to establish trustmarks if they choose, and to enter into contracts to ensure that these codes are complied with. If private actors have therefore sought to reinforce self-regulation on the basis of contracts, especially in the area of consumer sales, the binding effect of self-regulation should fall within the scope of the *Richtigkeitsgewähr*.

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[524] See http://www.foehlisch.de/guetesiegel/docs/D21_Qualitaetskriterien_2011.pdf.
[525] See http://www.internet-guetesiegel.de/index.html.
[526] The EHI regularly monitors compliance with its standards. Breach can be sanctioned by exclusion and withdrawal of the trustmark, see http://www.shopinfo.net/haendler/details-zur-pruefung/index.html. Similarly, breach of the standards established by S@fer Shopping results in withdrawal of the trustmark. Breach of the standards prescribed by Trusted Shops can be sanctioned by a fine and by exclusion and publication of sanctions, in accordance with the contractual provisions between Trusted Shops and its members, see http://www.trustedshops.de/shopbetreiber/pdf_download/TS-Vertragsbedingungen.pdf.
[527] Available at http://www.euro-label.com/en/about-us/index.html.
[528] Available at http://www.emota.eu/index.php?option=com_content&view=article&id=109&Itemid=91.
[529] See http://www.fedsa.be/main.html. The European organisation representing consumers, BEUC, also recognises a role of self-regulation in this field, see: http://ec.europa.eu/consumers/rights/docs/ds_resp_BEUC.pdf

Notwithstanding this freedom, the role of non-state actors is at first sight rather limited as one-sided juridical acts are not binding. Bachmann[530] points out that voluntary self-regulation ('*Freiwillige Selbstkontrolle*') is often based on, for example, ethics and relies on informal sanctions administered out of court, such as 'naming and shaming' on the one hand, and 'rewards' in the form of trustmarks ('*Gütesiegel*') on the other hand. It can be doubted whether business will be contractually bound to their statements of compliance with voluntary codes, as the statement is a juridical act without a contract partner. Notably, article 311 par. 1 BGB requires a contractual partner, which entails that one-sided declarations may often not have binding effect ('*Konsensprinzip*').[531]

A statement of compliance may under some circumstances constitute an offer in the sense of article 145 BGB, or a recognition of an obligation for the benefit of third parties ('*Schuldversprechen*' or '*Vertrag zugunsten Dritter*') in the sense of articles 780 and 328 BGB – which also results in an obligation enforceable by the consumer. This will also depend on whether actors stating compliance intend to be legally bound. The answer to this question depends on various factors.[532] Firstly, the question arises whether a code of conduct expressly targets a specific group, instead of addressing, for example, the legislator, in order to prevent legislative intervention. Secondly, if a code sets out clear rules, requires specific declarations of compliance or is clearly to the benefit of a clearly delineated group, this may more easily be assumed to have intended legal effect.

However, the impression that private actors play a small role as self-regulation is not binding may be misleading. State actors have played an important role in reinforcing these codes in the following ways:

1) Both German and European state actors have frequently enhanced the role of non-state actors by encouraging and reinforcing non-binding self-regulation. German state actors have encouraged the development of self-regulation encouraging 'fair' behaviour that goes beyond legal obligations, especially in areas where drafters' constitutional rights are at stake, in accordance with the *Effektivitätsgebot*.

2) The BVerfG[533] has emphasised that privately drafted rules may serve to indicate that business practices are established. They do not necessarily establish a normative rules.

3) Codes of conduct can also gain binding force indirectly, if they are used in the interpretation of blanket clauses.[534]

4) If businesses state that they comply with a code,[535] article 3 par. 3 UWG that implements article 6 par. 2 Directive 2005/29 on unfair commercial practices stipulates that misleadingly giving a consumer the impression that one meets the requirements of a trust mark constitutes a tort.[536]

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[530] G. Bachmann, *Private Ordnung*, p. 35.
[531] MunchKomm BGB/Emmerich (2012) article 311 nr 1. Of course, there are important exceptions to this rule, see further MunchKomm BGB/Emmerich (2012) article 311 nr. 21.
[532] G. Bachmann, *Private Ordnung*, p. 297.
[533] BverfGE 14 July 1987, *NJW* 1988, 191.
[534] BGB/Schulze (2012), article 276, nr 16, MunchKomm zum BGB/Grundmann (2012), article 276, nr 64.
[535] The Bundesverband Direktvertrieb Deutschland has based its code on the European code, see http://www.direktvertrieb.de/Verhaltensstandards.66.0.html. Other German members do however not refer to the code, see http://corporate.vorwerk.com/en/home/.
[536] See further Köhler/Bornkamm/UWG/Bornkamm (2012), appendix to article 3 par. 3, nr 2.1 et seq.

5) Misleading statements of compliance may make the contract avoidable for mistake or fraud.

6) Using a trustmark which is not independently monitored by third parties for a financial compensation, or which is not based on independent and public requirements, constitutes a misleading practice in the sense of article 5 UWG.[537]

4.5.3.6. Limitations to non-state actors' roles

The lack of success of self-regulation may give rise to two reactions.

Firstly, in cases where the lack of binding force (and success) entails that *Fremdbestimmung* does not often arise, actors have sought to replace self-regulation with legislation rather than developing control mechanisms, which may similarly limit the role of non-state actors.

The committee on financial affairs in the *Bundestag* has passed a motion emphasising the importance of the availability of a simple payment account to citizens, and has required the government to decide accordingly, at a European level. Simultaneously, the committee has called for a proposal for providing the alternative dispute resolution possibilities in disputes with regard to the refusal or termination of a bank account with binding force.[538] Yet even if the available ADR systems gain binding force, this does not mean that banks will be obliged to choose to comply with the code, while they may also choose to not subject themselves to ADR. Interestingly, Geschwandtener and Bornemann[539] have suggested a solution modelled after article 161 AktG, which would oblige banks to state compliance with the recommendation – this is however different from article 161 AktG that does not, as such, oblige businesses to state compliance – but under this model, banks can also explain non-compliance.

Secondly, the lack of binding effect and the critical approach to self-regulation has prompted state actors to reinforce self-regulation. In turn, *Fremdbestimmung* arising from reinforced self-regulation has been compensated in various ways: organising extensive drafting processes involving academics, that are considered more neutral than private actors, especially in the drafting of the *Nachhaltigkeitskodex*.

If the drafting process of a code has been transparent and representative, and independent actors have participated in the drafting of a code, the chance that compliance with this code is in the interest of a limited group of individuals decreases. In turn, this may be a reason for the judiciary to recognise or refer to privately drafted rules more easily: as the drafting process is of better quality, the problem of *Fremdbestimmung* may become smaller.[540]

In some areas, the emphasis on *Fremdbestimmung* and compensating *Fremdbestimmung* are curiously absent; this is the case for the BVI-Verhaltensregeln that have been encouraged, and that are in accordance with recent EU initiatives promoting ADR. The question arises whether these rules should be seen against the background of article 12 GG. Initiatives to revise the rules established by the BVI have already been established, but rejected. Although the *Effektivitätsgebot* does oblige German state actors to leave rulemaking to actors best placed to develop these rules, the current rules may arguably lead

[537] Köhler/Bornkamm/UWG/Bornkamm (2012), article 5, nr 2.165.
[538] Beschlussempfehlung und Bericht des Fionanzausschusses, 25.5.2012, BT-Drucks. 17/9798.
[539] M. Geschwandtener, R. Bornemann, 'Girokonto für jedermann - Vertragsabschlussfreiheit, Selbstregulierung oder gesetzlicher Zwang?', *NJW* 2007, p. 1256.
[540] See similarly G. Bachmann, *Private Ordnung*, p. 338.

to *Fremdbestimmung*, especially as they have been reinforced by the judiciary. However, the judiciary also has the possibility to critically evaluate these rules before reinforcing them.

At the European level, state actors have exercised control over the participation of actors in the development of European initiatives, and state actors have participated in the drafting of self-regulation.

4.5.3.7. Comparison

Some similarities and differences have become visible in the development of self-regulation and the role of actors at the national and European level. Self-regulation has been encouraged and developed both at the national and the European level. Both European actors and national actors have subsequently reinforced self-regulation.

However, German actors have more critically looked at the independence of actors developing self-regulation and the drafting process, which may also be a way to limit potential *Fremdbestimmung* arising from the reinforcement of self-regulation. The European Commission has also exercised control over the drafting of self-regulation. However, possibly, this control is not based on concerns over potential *Fremdbestimmung*, but on the emphasis that self-regulation is a suitable means to support European policy aims, by supporting, for example, the development of legislation in accordance with some actors' needs and preferences. Accordingly, similarly extensive drafting processes have not been organised at the European level.

4.5.3.8. Conclusion on one-sided self-regulation

Because of both German and European state actors' interventions, non-state actors developing self-regulation on the basis of one-sided juridical acts may play an important role, and they may also affect the rights of third parties, especially if self-regulation is reinforced by state actors, which is frequently the case.

German state actors have subsequently developed control mechanisms, particularly the involvement of state actors, academics, and the organisation of extensive drafting processes, to remedy potential *Fremdbestimmung*. This development has, as such, not been mirrored by European state actors, though they have participated in the development of self-regulation. Possibly, this may result in the development of forms of reinforced self-regulation in the form of models accompanying European legislative proposals or Recommendations that may give rise to *Fremdbestimmung*.

Thus, in these cases, German state actors seem less able to independently prevent *Fremdbestimmung*. In other words, interdependence between German and European state actors has developed.

4.5.4. Conclusion on non-state actors

Non-state actors play an important role in the development of self-regulation, either on the basis of the basis of contracts, articles of association or one-sided juridical acts. Legislators have provided private actors with ample opportunity to enforce self-regulation. Simultaneously, the role of private actors is limited as they may not impose rules on third parties, especially not rules that interfere with third parties' rights. Contractual regulation has been enforced or limited in accordance with the idea of *Richtigkeitsgewähr* and the closely

related notion of *Fremdbestimmung* that arises if contractual self-regulation does not fall under the scope of the *Richtigkeitsgewähr*.

Potential *Fremdbestimmung* has prompted German state actors to develop control mechanisms that mitigate the effect of binding self-regulation and that thereby limit non-state actors' role. Control mechanisms particularly frequently used are judicial control, the organisation of extensive drafting processes and mandatory law.

European actors developed less control mechanisms and use them less extensively, and less frequently in combination with one another. Especially the organisation of extensive drafting processes and the emphasis on the independence of actors is less visible, and less suited for, the European level. To a limited extent, European actors have developed judicial control and mandatory law. Forms that are however much more present are the participation in the development of self-regulation, which is necessary as there is no "European" *demos* that develops self-regulatory initiatives in a manner similar to the development of self-regulation at the national level within a legal framework. German actors participate less intensely in the development of self-regulation developed in the contect of constitutional rights. Also, European actors have limited the role of non-state actors by (partially) replacing self-regulation by legislation.

The initiatives from European actors and the difference between actors roles under German and European law make clear that interdependence has developed between European and national actors. On the one hand, European actors have demonstrated that they may not be aware of successful self-regulation, and accordingly have to rely on national actors to become familiar with relevant initiatives. On the other hand, national actors become less capable of independently subjecting non-state actors' roles to restrictions.

Similarly, interdependence between state actors and non-state actors is visible. Non-state actors' roles are limited if state actors establish legislation in fields where self-regulation was previously established, or where control mechanisms are developed. Yet at the same time, non-state actors' initiatives may be important to encourage fair behaviour beyond legal requirements, while the success of initiatives for European self-regulation depends on the participation of relevant non-state actors.

4.6. Conclusion

This chapter has asked what role actors play in the development of private law. Paragraph 4.6.1. will discuss the role of actors in the German framework, and paragraph 4.6.2. will summarise the role of actors under European law. Paragraph 4.6.3. will argue that the development of a European framework may also be beneficial. Paragraph 4.6.4. will compare the roles of actors under German and European law, and paragraph 4.6.5. will turn to question under which law the role of actors should be determined.

4.6.1. The role of actors under the German framework

The framework, closely interrelated with the GG, allows a central role for state actors. Legislative intervention follows from the obligation of the legislator to protect constitutional rights ('the *Untermaβverbot*'),[541] and a lack of intervention can therefore be problematic.[542] Moreover, the GG emphasises that national actors continue to play a central role notwithstanding the continuing reallocation of competences to the European level.

Nevertheless, non-state actors may play an important role in the development of private law as the GG and the BGB provide private actors with considerable freedom. German state actors have accordingly recognised the usefulness of including actors in the development of private law.[543] German state actors have frequently encouraged the development of alternative regulation and enhanced non-state actors' roles.

However, German state actors have also imposed restraints on the roles of non-state actors if *Fremdbestimmung* develops, through mandatory law, participation from state actors, extensive drafting processes and judicial evaluation.

4.6.2. The role of actors under European law

European law provides a much less developed framework to determine the role of actors. Nevertheless, it is clear that European state actors play a central role in the development of the private law *acquis* and other, non-binding initiatives. The allocation of competences between the Union and its Member States is determined by the TFEU.

Simultaneously, non-state actors may be allowed to play an influentual role if that is likely to promote European policy aims. The notion of *Fremdbestimmung* has not (yet) been developed as such at the European level and has therefore not given rise to control mechanisms limiting the role of non-state actors.

The roles of non-state actors are subject to restraint as the participation of actors is subject to the approval of European state actors, who may also play an active role in the development of European alternative regulation. The German regime has moreover inspired the European legislator to establish judicial evaluation in the area of STC's. At the same time, the role of non-state actors is less protected as the development of alternative regulation does not fall within the scope of fundamental rights.

The encouragement of the development of alternative regulation by European actors makes apparent that European actors clearly perceive the advantages of alternative regulation. Yet in some cases, national alternative regulation has also been replaced by Europena legislation. It may be concluded that although the European Commission often

[541] See further Maunz/Dürig, Grundgesetz-Kommentar/Grzeszick (Ergänzungslieferung 2012), article 20, nr 126-127.
[542] Bachmann, *Private Ordnung*, p. 58, see more far-going Vieweg 1990, p. 144.
[543] BVerfG 9. 5. 1972 - 1 BvR 518/62 u. 308/64, *NJW* 1972, 1504, C 2.

prefers to develop the private law acquis through legislative intervention, it does not have fundamental objections to the development of alternative regulation as such. Instead, possible objections seem mainly directed at to divergent national alternative regulation.

4.6.3. Developing a European framework

The need for developing a consistent European framework on the role of actors has also been indicated. Thus, Svilpaite [544] notes that the development of the Interinstitutional agreement and the subsequent use of alternative regulation raises questions as to how the development of law (including private law) can best be integrated within the European legal framework. The approach developed by the EU moreover shows gaps as some well-established forms of alternative regulation that do not meet the requirements set in the Interinstitutional Agreement on better lawmaking and are therefore neglected.

A framework would be beneficial because, firstly, it would provide more clarity on the way in which the private law *acquis* will be developed, and how forms of new governance relate to the private law *acquis*. Secondly, a framework would invite more careful consideration of which actors are best suited to develop private law, which in turn may prompt more debate on the question in what way European private law should be developed. if Member States adopt frameworks for determining the role of actors on the basis of similar principles, this may offer common points that may provide a starting point for debate on the role of actors and the use of techniques in the development of private law.

A European framework could not sharply delineate the role of actors. Rather, principles of private autonomy and *Fremdbestimmung* could form a starting point for European actors to consider the role of state actors and non-state actors. Even though the flexibility of alternative regulation and the difficulty to reach consensus at the transnational level have been reiterated, it is necessary to develop more control mechanisms and to take more note of objections of national actors. Overlooking national objections may eventually undermine the use or extension of new governance techniques to private law, notwithstanding the potential of these techniques, as national actors oppose these initiatives. Currently, some starting points for developing a cohesive framework may alreayd be discovered.

Firstly, at the European level, the principle of private autonomy has been recognised, as becomes clear from the DCFR and the proposal for a CESL. Similarly, the opposite concept of *Fremdbestimmung* and the problematicness of this possibility should be acknowledged as well.

Secondly, European actors have recognised the weaknesses of alternative regulation and have sought to improve alternative regulation accordingly. Criticism on comitology and the role of the IASB have accordingly prompted improvement, primarily in the form of more democratic control in the form of increased participation by the European Parliament.

4.6.4. Differences between the roles of actors under German and European law

Notwithstanding the suggestion to develop a European framework on the basis of principles of private autonomy and *Fremdbestimmung*, differences between the German framework and European law remain. Particularly, European and national state actors and non-state

[544] E. Svilpaite, *Self- and co-regulation instruments in the European legal framework*, p. 25 et seq.

actors have different roles of actors under the GG and the TFEU. The following differences are important:

1) The German framework has been clearly developed, and the role of European and national state actors, as well as non-state actors, is clearly delineated, on the basis of principles of democracy, private autonomy and *Fremdbestimmung*. European law does not have a similarly well-developed coherent framework but rather takes a functional approach, and the role of actors is accordingly less clearly delineated and more flexible than is the case under the German framework.

2) Under the GG, national actors retain a central role, and the reallocation of competences to the European level should be in line with the GG. In contrast, the CJEU has emphasised the hierarchy and the binding effect of European law independent of national law.

3) An *Untermaßverbot* at the European level would be difficult to reconcile with the principle of conferral of powers.

4) At the national level, non-state actors have a limited role in the development of legislation, but the role of non-state actors in the development of alternative regulation falls within the sphere of consitutional rights. To the contrary, non-state actors may play an essential role in the drafting of European legislation, while the development of alternative regulation is generally not considered in the light of fundamental rights. There is also no European equivalent of the *Wesentlichkeitsgebot*

5) In the private law *acquis*, the role of private parties has been less consistently limited than in German private law, which consistently bases parties' freedom and control mechanisms limiting non-state actors' influence on the *Richtigkeitsgewähr* and *Fremdbestimmung*.

These differences also follow from the differences between the European Union and the national legal order. Accordingly, the Union does not have to meet requirements of representative democracy in the way that national legislators should; instead, the emphasis of the BVerfG has been on participative democracy, unfortunately without clarifying which requirements this entails. Similarly, subjecting comitology processes, as well as the Lamfalussy process, to national standards has been criticised. Also, developing similarly extensive drafting processes and judicial control is problematic at the European level.

4.6.5. The German or European framework? The role of actors in the multilevel legal order

As the roles of actors under German and European law differs, what role do actors actually play? At first sight, European law takes precedence over national law, which theoretically entails that the roles of actors should be determined under European law. Notably, however, European law has taken a functional approach and has not clearly outlined actors' roles. Because most of private law, including self-regulation, is still developed at the national level, the well-developed German framework will usually determine the role of actors developing

private law in the German legal order, unless European law indicates otherwise. Furthermore, the German legal order is likely to adopt a more consistent, and therefore more predictable, approach to the development of co-regulation and self-regulation.

Thus, the role of actors should be determined taking into account both frameworks, as well as the changing role of actors and the increasing interdependence between actors.

4.6.5.1. Actors' changing roles

The initiatives from European initiatives and the role of European, national and non-state actors make clear that the role of European and national state actors as well as the roles of non-state actors is subject to change:

1) The roles of European, international and national state actors change as European actors become competent to enter into treaties. The ratification of treaties by European actors should fortify the influence of international actors as treaties are not ratified in separate Member States but throughout the Union, while treaties are moreover more likely to be interpreted uniformly throughout the Union by the CJEU.

2) The role of European actors increases as harmonisation continues. Yet national courts and legislator continue to play an essential role in the application and enforcement of harmonised law.

3) The changing roles of national, European and international actors are interrelated. The increasing role of the European legislator and the CJEU may both increase or decrease the role of international actors, whereas the competence of national actors diminishes.

4) Thus, the role of international actors may diminish if European actors harmonise an area despite successful treaties or model laws, as Member States will be less inclined or competent to ratify these treaties or make use of these model laws.

5) The role of national non-state actors may diminish as European actors have encouraged the development of alternative regulation (such as the standards developed by the ISBA or framework agreements), limiting the role of national actors developing alternative regulation in overlapping areas (such as the standards of the DRSC and TV's or BV's).

6) National and European non-state actors may also gain a more prominent role as they participate in the development of European alternative regulation, European legislation or national alternative regulation. Non-state actors at the national level such as the RNE may moreover seek to expand their influence beyond the national level.

4.6.5.2. Interdependence

As the roles of actors has changed, interdependence has developed. Consequently, European and national actors may undermine or strengthen one another's initiatives, which

becomes particularly visible as the roles of actors under German and European law may differ. Firstly, interdependence between state actors has developed:

1) The CJEU may approve of European measures that could subsequently be held *ultra vires* by the BVerfG, which could considerably decrease the success of European measures such as a Common European Sales Law. Simultaneously, the position of German state actors would be rather complicated as European law obliges them to enforce the CESL, while the GG prohibits these actors to do so.

2) As competence to enter into treaties and interpret treaties is reallocated to the European level, national actors remain only partially competent to renegotiate treaties, while questions on treaties will have to be referred to the CJEU. Consequently, both European and national actors are less able to independently ratify and interpret treaties.

3) Non-state actors can circumvent national limitations if they participate in the development of alternative regulation at the European level. Thus, national state actors are less able to limit non-state actors roles to prevent or limit *Fremdbestimmung*.

4) National actors may simultaneously be more hard-pressed to guarantee non-state actors' constitutionally protected roles. Particularly, the development of European alternative regulation may set aside well-established national alternative regulation.

5) European actors depend on national actors to develop successful European "self"-regulation, as they are unsufficiently familiar with succesfull national self-regulation and the frameworks within which it has developed.

Both national and European actors have interpreted the role of other actors narrowly. Are actors thus more likely to undermine one another's initiatives?

Equally, interdependence between state actors and non-state actors has developed:

1) Non-state actors at the transnational level have to take into account national state actors' restrictions, particularly restrictions on dynamic referral, which may restrict their influence.

2) Non-state actors have better insight in existing and developing business practices, which has been a reason for German and European actors to encourage the development of alternative regulation, as well as the participation of non-state actors' participation in the development of legislation.

3) Alternative regulation should be better able to cope with rapidly developing practices as it is more flexible than legislation.

4) The success of these initiatives depends on the participation of all relevant actors, although these actors can be encouraged by the "threat" of legislative intervention.

Thus, the role of actors should be determined under both the European and German framework, neither of which pays sufficient attention to the interdependence between actors and the corresponding need for interaction, even though both national and European actors recognise interdependence and interacftion.

Chapter 5: Actors developing private law in the Dutch legal order

5.1. Introduction

What actors develop private law in the Dutch legal order? Moreover, what would a framework deduced from the Dutch legal order look like and what is the role of actors in this framework and under the European law?

This chapter consider a Dutch framework in paragraph 5.2, and compare this framework with the role of actors under European law. Paragraph 5.3. will discuss the development of private law by state actors. Subsequently, paragraph 5.4. will consider the role of state actors and non-state actors in instances of co-regulation, and paragraph 5.5. will turn to the role of non-state actors in the development of self-regulation. Paragraph 5.6. will end with a conclusion.

5.2. Central questions on the role of state actors and non-state actors

The legislator and the courts clearly play a central role in the development of Dutch private law. Accordingly, the Burgerlijk Wetboek, other legislation, and case law play a central role in the development of Dutch private law. Yet while state actors clearly play a central role, they have also developed co-regulation, in cooperation with non-state actors, and encouraged the development of self-regulation. Nevertheless, the role of non-state actors is not clearly delineated. Thus, a framework to assess which role state actors and non-state actors should play in the development of private law is desirable. Giesen[545] finds that guidelines would moreover enhance the quality of alternative regulation. Furthermore, a framework enables a more consistent, predictable approach to the development of alternative regulation. Also, if alternative regulation is developed in sufficiently open and inclusive procedures, this may in turn increase the responsiveness of alternative regulation, and theoretically diminish the chance that contradictory sets of overlapping alternative regulation develop. What would such a framework look like?

Paragraph 5.2.1. will consider the German constitutional framework, as the German framework has inspired the question whether a framework can also be developed to assess the role of actors developing private law in the Dutch legal order. Because of the differences between the German and the Dutch legal order, the German framework cannot simply be transposed to the Dutch legal order, and therefore, this chapter will seek to develop a framework based on principles underlying the German legal framework. Paragraph 5.2.2. will consider the contrast between legal norms and juridical acts and the role of state actors and non-state actors and paragraph 5.2.3. will consider the idea of alternative regulation as a hybrid form between legal norms and juridical acts that may lead to *Fremdbestimmung* and corresponding control mechanisms. Paragraph 5.2.4. will end with an argument for the development of a framework in the Dutch legal order.

5.2.1. The German constitutional framework as a starting point?

[545] I. Giesen 'Alternatieve regelgeving in privaatrechtelijke verhoudingen', in: W.J. Witteveen, I. Giesen, J.L. de Wijkerslooth, Alternatieve regelgeving, Handelingen Nederlandse Juristen Vereniging, Deventer: Kluwer 2007, p. 147.

Although the notions underlying the German framework could serve as a starting point for a Dutch legal framework, private autonomy and *Fremdbestimmung* have a constitutional connotation that may diverge from the connotation of private autonomy in the Dutch legal order. Unlike the German legal order, where private autonomy is protected under article 2 GG, the Dutch Constitution, the *Grondwet* (hereafter: 'Gw') has not expressly recognised private autonomy as a constitutional right,[546] and there has been very little theory on the idea of *Fremdbestimmung*, in Dutch: *heteronomie*.[547] Thus, the prevention of *Fremdbestimmung* has not played as important a role in the Dutch legal order as is the case in the German legal order. Moreover, the development of self-regulation is not necessarily an exercise of constitutional rights. Furthermore, the Dutch legal order has not developed a doctrine equivalent to the *Wesentlichkeitsdoktrin*, while article 120 Gw stipulates more generally that the judiciary may not set aside legislation established in accordance with articles 81 et seq Gw that violates Dutch constitutionally protected rights protection. Notably, this prohibition does not extend to the ECHR, but it does entail a different relation between the legislator and the judiciary which may also entail a less critical approach towards the development of legislation, especially as the Gw does not include an equivalent of article 20 GG. Although articles 50 et seq Gw do refer to the representation of the Dutch people and elections, the Gw does not expressly refer to democratic principles. Interestingly, Kortmann[548] finds that a prominent role of stakeholder groups, media, and other interest that undermine the role of parliament are sociological problems rather than problems of positive constitutional law.

It follows from these differences that the role of actors differs. Therefore, the German framework cannot simply be transposed towards the Dutch legal order. Particularly, a Dutch framework will have to take into account that the judiciary may take a less active approach as it is not competent to set aside legislation. Meanwhile, the Gw imposes less restraints on the role of non-state actors in the legislative process, whose roles are however not considered in the light of constitutional rights. The different role of non-state actors also raises the question whether a Dutch framework should also take the distinction between state actors who pursue the public interest and non-state actors who pursue their own interests as a starting point.

5.2.2. The distinction between legal norms and juridical acts

What would a Dutch framework look like? Importantly, a framework should be based on ideas generally recognised in the Dutch legal order. Notably, the distinction between legal norms and juridical acts is not unfamiliar in the Dutch legal order. State actors are the source of binding rules, for private law especially legislation in the sense of article 81 Gw.

This prominent role of state actors, especially the legislator, is recognised in article 6:1 BW, that stipulates that the basis for legal obligations ('*verbintenis*') should follow from the law. In other words: state actors are competent to establish rules that can form the basis for obligations, private parties cannot establish similarly binding rules on third parties that have not consented to these rules. Previously, the traditional distinction between the law and juridical acts was more prominent in article 1269 Old BW, which stipulated that all obligations are based on the law or on contracts.[549] Van Dunné[550] finds that this distinction can be traced

[546] Comp. however A. Colombi Ciacchi, 'Private autonomy as a fundamental right in the European Union', *ERCL* 2010, p. 311-31 2 who points out that private autonomy has been defended by Dutch scholars.
[547] One of the few extensive books is C.E. du Perron, *Overeenkomst en derden*, Kluwer Deventer 1999.
[548] C.A.J.M. Kortmann, *Constitutioneel recht*, Kluwer: Deventer 2008, p. 333.
[549] The distinction in article 1269 Old BW was criticised as it did not sufficiently recognise that contract was a basis for obligations insofar as the law permitted, Asser-Rutte I, 6th ed. Zwolle, 1981, p. 53 et seq. The distinction between contracts and

to Roman law. Neither of these provisions entails that the law has to precisely and exhaustively stipulate all sorts of obligations – the system of the law leaves room for 'discovering' new obligations.[551]

It has been questioned whether article 6:1 BW establishes a 'closed' system that only allows for an obligation on these bases, or whether this classifcation is more 'open' and leaves room for obligation on other grounds, for example quasi-contract. The decisions of the Hoge Raad already indicate that neither article 6:1 BW nor article 1269 Old BW led to extensive considerations on the question whether an obligation was based on the law or on contract, and Dutch law has accordingly been charatcerised as a partially open system, where article 6:1 BW leaves the judiciary with sufficient room to establish obligations that are in accordance with the systme of the law.

Nevertheless, obligations on parties require a specific justification for that obligation.[552] It is undesirable to abandon this principle, as this rule enables parties to foresee on what basis they may be bound, which should mitigate inaccessibility as well as unpredictability that may arise from the development of rules by a large amount of actors.

Thus, state actors retain a central role in the development of private law as they establish binding norms, but private law also leaves considerable freedom for parties to develop binding rules in relations between them.

This role of public actors may be traced to the view that public state actors pursue the puiblic interest, which may not always be the case for private, non-state actors. Accordingly, a too prominent role of non-state actors and their intiatives may lead to corporatism, where groups of non-state actors, particularly stakeholders, pursue their own interests rather than the public interest.[553] Thus, the competence of non-state actors to develop binding rules depends on state actors.

5.2.3. Alternative regulation as a hybrid between law and contract?

Even though legislation establishes binding rules and private parties cannot establish similarly binding rules, Dutch law often assumes that alternative regulation can become binding, at least for parties involved in alternative regulation.[554] Accordingly, Van Driel[555] has considered self-regulation as 'law', albeit in a particular societal circle. Interestingly, however, alternative regulation is therefore not generally seen as a hybrid form, embodying both elements of law, as it is binding on third parties, and contract, as it is based on negotiating parties' consent. Instead, the binding force of alternative regulation has been based on the consent of parties or the law.[556] The emphasis in discussions on alternative regulation in private law is therefore not on potential *Fremdbestimmung*.

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the law as basis for obligations has instead been traced to the voluntariness of these obligations, see Ch. Fried, *Contract as promise: A theory of contractual obligation*, Harvard University Press: Cambridge, Ms. 1981, p. 1-2. See critically on this distinction J.M. Smits, *Het vertrouwensbeginsel en de contractuele gebondenheid*, Arnhem: Gouda Quint 1995, p. 168 et seq.

[550] J.M. van Dunné, *Verbintenissenrecht: Onrechtmatige daad en overige verbintenissen*, Kluwer: Deventer 2004, 5th ed., p. 29.

[551] Parl GS (Book 6), p. 1438-1439.

[552] For example J.M. Smits, *Bronnen van verbintenissen*, Kluwer: Deventer 2003, p. 23: 'In het systeem van ons vermogensrecht verdient de aanwezigheid van een verbintenis van de een jegens de ander steeds een rechtvaardiging.'

[553] H.K. Lindahl, 'Zelfregulering: rechtsvorming, democratie en reflexieve identiteit', *RM Themis* 2006, p. 39.

[554] I. Giesen, 'Alternatieve regelgeving in privaatrechtelijke verhoudingen', in: W.J. Witteveen, I. Giesen, J.L. de Wijkerslooth, Alternatieve regelgeving, Handelingen Nederlandse Juristen Vereniging, Deventer: Kluwer 2007, p. 93-95.

[555] M. van Driel, *Zelfregulering: Hoog opspelen of thuisblijven*, Deventer: Kluwer 1989, p. 2.

[556] I. Giesen, in: W.J. Witteveen, I. Giesen, J.L. de Wijkerslooth, *Alternatieve regelgeving, Handelingen Nederlandse Juristen Vereniging*, Deventer: Kluwer 2007, p. 95, who, at p. 100, also distinguishes between a third basis for the binding force of alternative regulation: reception of alternative regulation in the interpretation of blanket clauses or business practices that courts take into account.

This perspective should be reconsidered. Rather than assuming that the binding force is sanctioned by the legislator or judiciary, or can be legitimised by consent, the chance that both these bases are absent as binding rules develop beyond legislative procedures that are also not based on consent of parties should be considered more attentively, even if *Fremdbestimmung* is not a problem expressly considered in the Gw.

Nevertheless, as a general rule, non-state actors may not independently establish binding rules on third parties that have not consented to be bound.[557] Thus, state actors retain some level of control over alternative regulation, and the law remains a source for the binding force of alternative regulation.[558]

Because the debate on alternative regulation has not centered on notions of alternative regulation and *Fremdbestimmung*, control mechanisms have not been developed to prevent or mitigate *Fremdbestimmung* while protecting private autonomy. Nevertheless, the need to safeguard the quality of alternative regulation has prompted actors to develop benchmarks that are reminiscent of some of the measures developed in the German legal order to prevent *Fremdbestimmung*, while the idea that actors will be bound by rules that they have not consented to by actors that have also not been democratically elected (i.e. *Fremdbestimmung*) might also not receive enthusiastic support.

Fremdbestimmung also draws attention to potential problems that may become more urgent as the role of non-state actors increases. Specifically, as alternative regulation develops, there is more risk that parties are confronted with rules to which they have not consented, which in turn may undermine the predictability and accessibility of private law. In the multilevel legal order, the amount of possible sources to whcih parties may become bound is only likely to increase.

Thus, mechanisms reminiscent of German control mechanisms have been defended and established, and should be established further. Particularly, Vranken[559] has indicated that the support for self-regulation, as well as the representativeness of actors developing alternative regulation and the possibility to participate in drafting processes are starting points for benchmarks to evaluate the quality of alternative regulation. Giesen[560] similarly suggests benchmarks similar to benchmarks for good law, adding that these requirements compensate the lack of democratic legitimation. Notably, the quality of alternative regulation should be evaluated by state actors that consequently retain an important role.

5.2.4. Towards a framework for the role of actors developing private law in the Dutch legal order

The framework developed in this chapter focusses on the role of state actors and non-state actors. Whereas the role of state actors in the development of legislation and case law seems relatively straightforward, the roles of both state actors and non-state actors is less clear.

Although alternative regulation is usually not considered as a hybrid form that gives rise to potential *Fremdbestimmung*, possible corporatism has been recognised as problematic, and state actors have restricted non-state actors' roles. Even though *Fremdbestimmung* has not formed a starting point to limit non-state actors' roles, these principles may offer a critical perspective on Dutch practice and provide consistent guidelines

[557] Asser-Vranken (2005) I-3, p. 87.
[558] H.K. Lindahl, 'Zelfregulering: rechtsvorming, democratie en reflexieve identiteit', *RM Themis* 2006, p. 42.
[559] Asser/Vranken (2005) I-3, nr 91.
[560] I. Giesen, in: W.J. Witteveen, I. Giesen, J.L. de Wijkerslooth, *Alternatieve regelgeving, Handelingen Nederlandse Juristen Vereniging*, Deventer: Kluwer 2007, p. 151-152.

that are currently not sufficiently developed in the Dutch legal order. Thus, similarly to the previous chapter, this chapter will consider measures through which Dutch state actors have limited the role of non-state actors as the development of 'control mechanisms', i.e. mechanisms that control the extent to which alternative regulation leads to *Fremdbestimmung*. Notably, even if these mechanisms do not directly aim to compensate for *Fremdbestimmung*, they may nevertheless have that effect. As the idea of *Fremdbestimmung* is recognised as problematic, this chapter will consider whether Dutch law, in particular instances of alternative regulation and limitations to the roles of actors currently already offers starting points for the development of a framework based on private autonomy and *Fremdbestimmung*.

Importantly, when developing a framework, the increasing role of European actors and the roles of actors under European law should be taken into account.

While it is undesirable that the suggested framework diverges radically from European law, European law currently does not clearly outline the role of actors and it has been criticised in the previous chapter. Consequently, rather than taking the role of actors under European law as a starting point, the subsequent chapter will indicate the cases in which the suggested framework may be difficult to reconcile with European law. Possibly, these cases will largely converge with areas in which the German framework provides actors with a different role than European law.

In the framework, state actors continue to play a central role as they remain the source of binding rules. The role of non-state actors is limited as they are not competent to develop binding rules independently of state actors. If state actors reinforce alternative regulation, this may lead to *Fremdbestimmung*, and the need for control mechanisms may arise. However, as the amount of state-sanctioned alternative regulation increases, as will become visible in paragraph 5.4., the role of non-state actors increases.

5.3. State actors

This chapter will ask what role state actors have played in the development of private law. Paragraph 5.3.1. will turn to the role of national state actors, and paragraph 5.3.2. will discuss the role of European and international actors. Paragraph 5.3.3. will end with a conclusion.

5.3.1. The legislator and the *Hoge Raad*

In the Netherlands, the legislator has played a central role in the development of private law through the Burgerlijk Wetboek (hereafter: 'BW') as well as codes in other areas of law. Notably, a distinction between general private law and *Sonderprivatrecht* visible in the Germna legal order, has not, as such, been discussed in the Dutch legal order.

The BW leaves a considerable role for the judiciary. Notably, the relationship between the legislator and the *Hoge Raad* has been subject to debate,[561] as well as the competence of the *Hoge Raad* to develop, rather than 'merely' interpret, private law. Some authors[562] object that the Gw does not provide the *Hoge Raad* with the competence to develop private law, while it is also contrary to the *trias politica*. Most authors[563] do not dispute this role of the *Hoge Raad* – to the contrary, the report '*Versterking van de cassatierechtspraak*' [564] suggested emphasising this role. The report has met with approval by the legislature[565] and the *Hoge Raad*[566] and has since become law, thus providing the role of the Hoge Raad in the development of private law with a democratic basis.

5.3.2. The development of private law beyond the state

This paragraph asks what role European state actors and international actors play in the development of European private law. Paragraph 5.3.2.1. will consider the role of European actors and paragraph 5.3.2.2. will turn to the role of international actors. Paragraph 5.3.2.3. will end with a conclusion.

5.3.2.1. European actors

Paragraph 5.3.2.1.1. will consider the role of European actors under European law and paragraoh 5.3.2.1.2. will consider the role of actors under Dutch constitutional law. Paragraph 5.3.2.1. will compare the role of actors under the TFEU and the Gw and interdependence between actors.

5.3.2.1.1. The role of European actors under the TFEU

[561] See generally for the role of the *Hoge Raad* in the development of private law Asser/Scholten 1974 (1-I), Asser/Vranken 1995 (1-II), Asser/Vranken 2005 (1-III), and G.J. Wiarda, *3 typen van rechtsvinding*, p. 38-43.
[562] C.A.J.M. Kortmann, Staatsrecht en raison d'Etat, lecture Nijmegen, 2009**,** p. 11-12, C. Schutte, 'De rechtsvormende taak van de rechter? Een kritische noot', *AA* 2009, p. 676-680**,** P.P.T. Bovend'Eert, 'Wetgever, rechter en rechtsvorming. Partners in the business of law?', *RM Themis* 2009, p. 145-153.
[563] See for example: A. Hammerstein, 'Rechtsvorming door de rechter is onvermijdelijk', AA 2009, p. 672,
[564] Commissie normstellende rol van de Hoge Raad, *Versterking van de cassatierechtspraak*, 2009, available at www.minjus.nl.
[565] *Kamerstukken II* 2007/08, 29 279, nr. 69 and 78.
[566] Hoge Raad der Nederlanden, Verslag 2007 en 2008, available at http://www.rechtspraak.nl/NR/rdonlyres/E4D94FD0-01D0-49A4-97F6-F1824C261971/0/08668HRjaarverslag2008_clickablePDF.pdf.

European actors play a prominent role as European law as European law may precede national law.[567] The private law *acquis* consists mostly of Directives and has been based primarily on article 114 TFEU.[568] The private law *acquis* consists mostly of Directives that have generally been implemented in the BW. However, the role of European actors remains limited as the *acquis* only harmonises fragmented parts of private law and as various Directives pursue minimum harmonisaiton, levaing additional competence to the national legislator.

Moreover, European primary law may contain rules in the area of private law, particularly rules on non-contractual liability, as stiupulated in article 340 TFEU. In addition, primary law, such as competition law, may affect contracts. Also, the role of the European legislator and the CJEU increases as the Union ratifies treaties.

5.3.2.1.2. The role of European actors under Dutch constitutional law

Dutch actors have not maintained that they remain competent to determine the role of European actors under the Gw. Quite the reverse - it has been argued that European law has binding effect apart from articles 93 and 94 Gw.[569] This has also been recognised by the Hoge Raad.[570]

Thus, on the basis of European law, national private law may be challenged if, for example, it breaches free movement guaranteed in the Treaty.

5.3.2.1.3. The role of European actors under the Gw and the TFEU

Whereas the BVerfG has maintained a central role for the GG, this is not the case inthe Dutch legal order. The Dutch view that European law is directly applicable not on the basis of article 93 and 94 Gw is in accordance with CJEU decisions. Thus, European actors have an important role both under the TFEU and the Gw. The convergence between the TFEU and the Dutch view in this respect means that the Dutch judiciary does not have the competence to subject the reallocation of competences to the European level or the legality of European measures to evaluation. Consequently, Dutch courts are less able to undermine CJEU decisions on the competence of the European legislator.

Thus, less interdependence has become visible. It follows that the Hoge Raad does not have a similar need to exercise restraint in its decisions on the legality of European measures. Moreover, the position of the Dutch legislator is less complicated, and the Dutch legislator need not ensure that amendments to the treaties or proposed European measures are in accordance with the Gw. Nevertheless, interaction between national parliaments and the European Parliament to discuss proposed measures, especially if national parliaments have lodged a complaint that a measure is not in accordance with subsidiarity, seems useful for both actors at the national level and actors at the European level.

5.3.2.2. The role of international actors in the development of private law

[567] CJEU 15 July 1964 (Costa v E.N.E.L.), case 6-64, [1964] ECR, p. 585. CJEU 7 March 1985 (Van Gend & Loos NV v Inspecteur der Invoerrechten en Accijnzen), case 32/84, [1985], ECR, p. 779.
[568] See previously par. 4.3.2.1.1.
[569] See note 7 to article 93 Gw in Tekst & Commentaar Grondwet by Fleuren.
[570] HR 2 november 2004, *NJ* 2005, 80. E.A. Alkema gives an overview of the debate in his note to this decision.

International actors play an important role in the Dutch legal order as articles 93 and 94 Gw stipulate that depending on their content, treaties such as the ECHR are directly binding and set aside national law. Consequently, the role of the Dutch legislator, who does not have to implemented treaties into Dutch law, is smaller than the German legislator. International instruments may however not set aside mandatory law that is applicable as *ordre public*.

The Dutch legislator has ratified various treaties in the area of private law.[571] An important treaty and well-known example of treaties in the area of private law is the CISG. Other relevant treaties have been concluded on cultural heritage, international law on security interests,[572] transport,[573] and intellectual property.[574] Prominent treaties in the area of international private law have since been ratified by the EU who on the basis of articles 81 et seq TFEU is competent to further develop the law in this area.

Moreover, international organisations have established model laws, legislative guides and recommendations. These sources are not directly binding and the extent to which national actors make use of these sources also depends on te extent to which European actors have chosen to use or disregard these sources.

5.3.2.3. Conclusion on the development of private law beyond the state

European actors may play an important role in the development of private law. Even though international law may have direct effect in Dutch law, this is not the case for European law, whcih requires that international law is implemented before it can become effective. Thus, as European actors increasingly enter into treaties, these treaties become effective after implementation into European law that has a direct effect, not on the basis of articles 93 and 94 Gw, but on the basis of European law.

5.3.3. Conclusion on state actors

State actors continue to play a central role in the development of private law. National state actors play a more prominent role as they have provided general rules in most areas of private law. European actors play a prominent role as European law may set aside national law, but their role remains limited as the *acquis* takes a fragmented approach.

The role of European actors under the national framework and the TFEU is largely similar as the priority and direct effect of European law find their basis in European law rather than the Gw. However, the role of international actors is more prominent under the Gw than is the case under the TFEU, under which international measures have to be implemented in European law before they become binding. Yet as European actors have precedence on the basis of European law, under the Dutch framework, European law will precede international law. Thus, no conflict arises. Moreover, the role of European actors may also influence the role of international actors, as international law does not stand in the way of harmonisation.

Because the roles of actors under European law and under Dutch law largely coincide, interdependence has become less pronounced than is the case in the German legal order. Nevertheless, interaction between actors at the national and European law remains beneficial.

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[571] The site https://zoek.officielebekendmakingen.nl/zoeken/tractatenblad enables a search for currently ratified treaties.
[572] For example recently the UNIDROIT Convention on International Interests in Mobile Equipment.
[573] For example the Hague Rules ('Brussels cognossementsverdrag').
[574] For example the 1962 Benelux Convention concerning Trademarks.

5.4. State actors and non-state actors: co-regulation

This paragraph will ask what role state actors and non-state actors have played in the development of European private law.

Paragraph 5.4.1. will turn to the referral to private actors in legislation, and paragraph 5.4.2. will consider reinforced codes of conduct. Paragraph 5.4.3. will discuss the development of reinforced collective negotiations. Paragraph 5.4.4. will end with a conclusion.

This paragraph will not elaborately reconsider instances of co-regulation that have already been considered in the previous chapter. Instead, this chapter will merely mention these instances and refer back to the previous chapter for further details. Only if Dutch actors have for example developed additional rules, more attention will be paid to already considered European forms of referral.

5.4.1. Referral to private actors and new governance

What role do actors play if the legislator refer to self-regulation in legislation? Referral is rarely used by the Dutch legislator, but increasingly used by the European legislator.

Paragraph 5.4.1.1. will turn to instances of referral and paragraph 5.4.1.2. will ask what role non-state actors have played in these instances. Paragraph 5.4.1.3. will consider the lack of limitations on non-state actors' roles by the dveelopment of control mechanisms. Paragraph 5.4.1.4. will end with an argument to develop more control mechanisms on the basis of concepts of private autonomy and *Fremdbestimmung*.

5.4.1.1. Instances of referral

In the Dutch legal order, instances of referral are rare.

- A rare example of "dynamic" referral, can be found in article 6: 214 BW on the development of STC's by state and non-state actors, which has turned out to be a dead letter as STC's have been developed in collective negotiations between stakeholder groups.

At the European level, referral to non-state actors is more commonly found:

- In Regulation 1606/2002, referral is made to the IASB.[575]

Forms that are reminiscent of referral have also been developed at the European level:

- Comitology.[576]
- The Lamfalussy process.[577]

These Directives have been implemented in Dutch administrative law, but they are also relevant for determining appropriate behaviour for financial institutions towards consumers, imposing information

[575] See more elaborately previously par. 4.4.1.1.
[576] See more elaborately previously par. 4.4.1.1.
[577] See more elaborately previously par. 4.4.1.1.

duties and duties to gather information about potential debtors ('know your client') on creditors.[578] In particular Cherednychenko[579] has argued that as the maximum harmonisation approach in the MiFiD Directive leaves less room to develop diverging standards in contract law. The approach of the MiFiD Directive is visible in Directive 2008/48 that introduces the 'know-you-client principle'.

These harmonised rules have not withheld actors from developing codes of conduct in this field.[580] Instead, existing initiatives, especially the Bureau on Credit Registration ('*Bureau Krediet Registratie*', 'BKR'),[581] that manages a central credit information system, are in line with the principle of 'know your client'. Despite these initiatives, a common standard for assessing the creditworthiness of consumers has not developed. The Netherlands Authority for the Financial Markets ('*Autoriteit Financiële Markten*', 'AFM')[582] has criticised the lacuna between the codes of conduct from the Dutch Banking Association ('*Nederlandse Vereniging van Banken*', 'NVB') and the Association of Financing Companies ('*Vereniging van Financieringsondernemingen in Nederland*', 'VNF').[583] In response, the NVB has suggested cooperation between interested parties.[584]

The development of administrative law has moreover rendered the effect of some codes of conduct unclear. The Dutch association of insurers ('*Verbond van Verzekeraars*') has decided to withdraw the code of conduct on the information provided by intermediaries ('*Gedragscode informatieverstrekking dienstverlening intermediair*', 'GIDI') and the code of conduct on the return of commissions. They are considered outdated with the law on financial supervision ('*Wet financieel toezicht*') on financial services ('*Wet financiële dienstverlening*').[585] Confusingly, associations and individual companies have adapted GIDI for their members and specific fields and still announce the applicability of this code of conduct.[586] In addition, the code of conduct on the provision of information to consumers on the returns and the risks of life insurance and insurance on investments with profit sharing ('*Code rendement en risico*'),[587] has been revised and integrated with the '*Financiële bijsluiter*', a manual for complex financial products.

5.4.1.2. The role of non-state actors

As referral has barely taken place at the national level, the role of non-state actors in referral is limited, especially as article 6:214 BW is generally not used.

5.4.1.3. Limitations on the role of non-state actors

[578] Especially the Wet financieel toezicht. Comp. also the rules on supervision on stock exchange ('*Nadere Regeling Toezicht Effectenverkeer*') that establish a duty of care for credit institutions to gather information on the financial position and expertise of their clients.
[579] O.O. Cherednychenko, 'Zorgplichten bij financiële contracten: Is er nog een wezenlijke rol voor het contractenrecht weggelegd?', *Contracteren* 2007, p. 88. Comp. however HR 3 February 2012, *AA* 2012, p. 752, and the note of D. Busch with further references.
[580] These codes include including the Code of Conduct on Consumers' Credit ('*Gedragscode consumptief krediet*') of the NVB available at http://www.nvb.nl/scrivo/asset.php?id=290675, as well as its the Code of conduct on mortgage credit ('*Gedragscode Hypothecaire Financieringen*'), available at http://www.nvb.nl/scrivo/asset.php?id=106951, code of conduct on the granting of credit, developed by the Association of Financing Companies ('*Vereniging van Financieringsondernemingen in Nederland*', 'VFN'available at http://www.vfn.nl/index.php?p=30862
[581] See for more information http://www.bkr.nl/OverBKR.aspx?pid=34.
[582] AFM, Verantwoorde kredietverstrekking 2006, available at http://www.afm.nl/marktpartijen/upl_documents/rapport_verantwoorde_kredietverstrekking_2006_120107.pdf.
[583] AFM Consultatiedocument toetskader hypothecaire kredietverlening, 2009, p. 24, available at http://www.afm.nl/marktpartijen/upl_documents/consultatiedocument_hypotheken.pdf.
[584] NVB – reactie AFM – Consultatie toetskader hypothecaire kredietverlening, available at http://www.nvb.nl/scrivo/asset.php?id=291762.
[585] See http://www.verbondvanverzekeraars.nl/sitewide/general/nieuws.aspx?action=view&nieuwsid=24.
[586] For example: http://www.rabohypotheekonline.nl/voorwaarden/gedragscode/. For the full text of GIDI, the bank refers to their brochure 'De Rabobank als bemiddelaar van uw verzekeringen' (http://www.rabobank.nl/images/2800_rabobank_als_bemiddelaar_29185695.pdf), which does not mention the GIDI. Other examples: Avéres Assurantiën (for conciliation for insurance and other financial services: see http://www.averes.nl/service/gidi), De Uitvaart Makelaar (for conciliation of insurances on funerals and cremations, see http://www.deuitvaartmakelaar.nl/gidi.pdf), Hypohome (specialised in advice on mortgages, see http://www.hypohome.nl/gidi-advieswijzer.htm).
[587] Available at http://www.verbondvanverzekeraars.nl/UserFiles/File/download/coderendementrisico2006.pdf.

At the national level, few control mechanisms have been developed, and the role of non-state actors is therefore subect to little restraints. The lack of control mechanisms is in accordance with the restraint of the legislator in establishing legislation, emphasising the capability of private actors to develop adequate rules. Accordingly, the legislator consistently considers whether, instead of legislation, alternative regulation can be established.[588] This leaves a considerable role for non-state actors, despite the absence of the *Wesentlichkeitsgebot*.

Notwithstanding its usual restraint, the Dutch legislator has held that if the law refers to privately drafted rules, this will typically concern static, rather than dynamic referral.[589] While this may be the reason for the scarcity of instances in which the Dutch legislator has made use of dynamic referral, this has not limited the role of non-state actors involved in dynamic referral at the European level. Even though the introduction of the Regulation has resulted in a reallocation of competence that has put the decision-making in this area out of Dutch democratic control, the Dutch legislator supported dynamic referral to the IASB.[590]

Similarly, the Dutch government has not sought to limit the roles of non-state actors in comitology committees. In the consultation on the proposal for a Directive on consumer rights, the Dutch government, Dutch academics and Dutch stakeholders[591] did not take a position on a possible comitology procedure. This is in line with the pragmatic approach towards the delegation of competences towards lower levels of government that does not show a particular emphasis on parliamentary involvement.[592] However, this approach is not in line with more general criticism of alternative regulation.[593]

5.4.1.4. A plea for a framework on the basis of private autonomy and *Fremdbestimmung*

A framework to determine the role of actors more consistently and predictably is deisrable. Can starting points be found for the development of a framework on the role of state actors and non-state actors in the development of private law?

Some starting points can be found in criticism on the lenience of Dutch and European actors, pointing out that the prominent involvement of private actors may be detrimental to the quality of private law. Accordingly, Hijink[594] finds that the current development of standards by the IASB undermines the stable development of the law, as well as sufficient accessibility of the law, while the development of binding law should moreover have a legal basis. The use of comitology has also been criticised as it might undermine democracy, while it is also not a very transparent process; it meets with similar criticism of 'skeleton legislation' ('*kaderwetgeving*') at a national level.[595] Specifically, the propused use of comitology in draft article 40 of the proposal for a Directive on consumer rights may similarly give rise to problems. The development of the black and grey list of unfair contract terms by private parties may result in situations where contract parties are confronted with rules that are contrary to society's legal views on justice, especially as actors in comitology committees may not have sufficient insight in these views or in business practices. Consequently, the

[588] Aanwijzingen voor de regelgeving 7, 8.
[589] Aanwijzingen voor de regelgeivng 92.
[590] Kamerstukken II, 2001-2002, 28220, nr 3, comp. also kamerstukken II, 2006-2007, 21501-07, nr 541.
[591] See the response available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/responses/ms_netherlands.pdf. For an exception, see the WODC report on the conculstation that rejects comitology, see
[592] Comp. aanwijzingen voor de regelgeving 35.
[593] See especially T. Hartlief, 'Alternatieve regelgeving in privaatrechtelijke verhoudingen. Opmerkingen bij het preadvies van prof. mr. I. Giesen', *NJB* 2007-21.
[594] J.B.S. Hijink, 'Naar een Europees jaarrekeningenrecht', *Ondernemingsrecht* 2012, 28.
[595] Comp. the Annual report of the raad van State 2006, p. 57, available at http://www.raadvanstate.nl/publicaties/jaarverslagen/.

accessibility and the responsiveness of the law may be undermined. Generally, criticism on alternative regulation refers to potential corporatism and the question how alternative regulation fits with the traditional *trias politica*, especially with regard to the role of the judiciary, as well as the question whether alternative regulation will contribute to accessibility and predictability. A more critical approach towards the development of referral would also be in line with more general criticism of alternative regulation.

Private autonomy and *Fremdbestimmung* could provide a starting point critically considering the desirability of extending the scope of existing alternative regulation such as dynamic referral to the IASB, comitology, the Lamfalussy process, and developing new forms of alternative regulation.

Notably, concepts of private autonomy and *Fremdbestimmung* do not stand in the way of the development of alternative regulation, but indicate the need to develop control mechanisms. The question which mechanisms should be developed in turn depends on the question how state actors want to mitigate potential *Fremdbestimmung* and when they consider that potential *Fremdbestimmung* has been sufficiently limited. Suggestions of Dutch actors[596] point towards ensuring the quality of the drafting process of alternative regulation, in accordance with requirements of transparency, inclusiveness and responsiveness. Notably, these suggestions do not take national democratic procedures as a starting point; they are more in line with the suggestions of participative democracy.[597]

This does not mean that calls for a more open process would not meet with problems. Especially in the Lamfalussy process and the development of international accounting standards, the level of expertise needed to decide rationally would make wide participation difficult. However, other matters, such as the question which clauses should be on a black or grey list, may well be discussed in a wider circle.

5.4.2. Codes of conduct: The corporate governance code and the banking code

Paragraph 5.4.2.1. will consider instances of co-regulation where state actors have reinforced codes of conduct developed by private actors and paragraph 5.4.2.2. will turn to the role of non-state actors in these instances and paragraph 5.4.2.3. will discuss limitations on non-state actors' roles through the development of control mechanisms.

5.4.2.1. Reinforced codes of conduct

In the Dutch legal order, reinforced codes have been established:

- The corporate governance code establishes norms for the internal relationships within a company. In turn, the behaviour of these parties influences various parties, especially parties contracting with these companies: employees, customers, and suppliers.

The establishment of the corporate governance code dates back to 1996, when stakeholders, pending the proposal for a law on protectionist constructions ('*beschermingsconstructies*'), established a committee to investigate corporate governance.[598] This committee published its recommendations in

[596] See previously par. 5.2.3.
[597] BVerfG 30 June 2009 2 BvE 2/08 u.a. *NJW* 2009, 2267 (Lisbon Treaty), see previously par. 4.3.2.1.2.
[598] For more information on corporate governance code see Asser/Maeijer/Ingh 2-II, nr. 28-30, and the special issue of *Ondernemingsrecht* 2004-4.

1997,[599] and expressly stated that legislation on this subject was not required. Instead, self-regulation would be sufficient. However, after evaluation, compliance with these recommendations was judged as insufficient.[600] Therefore, in 2003, stakeholders, cooperating with the Ministries of Economic Affairs and Finance established a committee to form a code of conduct for corporate governance that was published in the same year and entered into force in 2004.[601] The government installed a Monitoring Committee on the Corporate Governance Code[602] that reports to the government. Businesses cannot deviate from certain principles and best practices regulated in the Code, as parts of the Code can reflect Dutch accepted views on corporate governance and thereby form a source of law.[603] The establishment of the corporate governance code fits with (newly developing) European standards.[604]

- The new Dutch banking code from the Netherlands' Banking Association ('*Nederlandse Vereniging van Banken*', 'NVB')[605] that was established following a report from the Advisory Committee on the future of banks in the Netherlands[606] sets standards for the supervisory board and the management board, risk management, audits, and remuneration. The Code explicitly aims to influence transactions between individuals: compliance with this Code is meant to improve the consumers' trust in banks, and to prevent (further) collapses. Also, the behaviour of banks directly influences its contracting parties, whether they are consumers, businesses or states.

Although state actors have not cooperated directly in creating the rules contained in the Code, the advisory committee expressly stated that the best practices in the first two chapters of the code were not meant as self-regulation and should be enforced by state legislation.[607] The Ministry of Finance, in cooperation with stakeholders, will consider at what points and in what manner the Code can best be reinforced with 'hard law'[608]: possibly, the banking code could be appointed as a code of conduct in the sense of article 2:391 par. 5 Civil Code that would oblige banks to account for compliance with these principles. Moreover, a monitoring committee will be established in cooperation with the Ministry of Finance. The banking code explicitly takes relevant national, European and international standards into account and can especially be seen in the light of the establishment of European supervisory bodies that also act as committees in the third level of the Lamfalussy process, supervising the enforcements of the Capital Requirements Directive.

The simultaneous initiatives at the national, European and international level after the credit crunch that preceded the establishment of these supervisory bodies[609] have led to criticism on the

[599] The text of the recommendations is available at http://www.commissiecorporategovernance.nl/Commissie%20Peters.
[600] See for the government reaction to the report TK 1998-1999, 25732, nr. 8. See for a critical reaction to the government's statement J.W. Winter, 'Oorlog en vrede', *Ondernemingsrecht* 1999, p. 203.
[601] The corporate governance code has been revised in 2008. Both versions are available at http://www.commissiecorporategovernance.nl/De_Corporate_Governance_Code_2003_%28de_Code_Tabaksblat%29. The government decided (Art. 2 Besluit 23 December 2004, Stb. 747) that the corporate governance code formed a Code in the sense of art. 2: 391 par. 5 Civil Code (expanded following Directive 2006/46, (amending Directive 78/660 on annual accounts, Directive 83/349 on consolidated annual accounts, Directives 86/635 and 91/674 on annual counts for banks and insurance undertakings) see *Stbl*. 2008, 550). See *TK* 2007-2008, 31508, nr. 3.
[602] *Strct.* 2004, 241, p. 11.
[603] Comp. HR 21 February 2003, *NJ* 2003, 182, under 6.4.2, and HR 13 July 2007, *NJ* 2007, 434, under 4.4.
[604] European Commission, *Modernising Company Law and enhancing corporate governance in the European Union – A Plan to move forward*, COM (2003) 284 final, and Decision of the Commission 15 October 2004, PbEU 2004, L 321/53, resulting in Directive 2006/46, leading to the amendment of the decision of 23 December 2004, Stb. 747. See for more information J.N. Schutte-Veenstra, 'De toekomst van het Europese vennootschapsrecht', *Ondernemingsrecht* 2006, p. 577-580.
[605] Banking Code of 9 September 2009, available at the website of the Netherlands Bankers' Association, www.nvb.nl.
[606] Advisory Committee on the future of banks in the Netherlands, *Restoring trust*, 7 April 2009, available at the website of the Netherlands Bankers' Association, www.nvb.nl.
[607] Advisory Committee on the future of banks in the Netherlands, *Restoring trust*, p. 9 and V.P.G. de Serière, '"Naar herstel van vertrouwen." Het rapport van de Adviescommissie Toekomst Banken', *Ondernemingsrecht* 2009, nr. 83.
[608] Letter from the minister of finance to the *Tweede Kamer* (Parliament) 15 June 2009, FM/2009/1022 M, p. 3.
[609] These developments also include the report from the High-Level Group on Financial Supervision published on future financial regulation and supervision, available at http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf, followed by a Communication on European financial supervision COM (2009) 252 final and EC legislative proposals, COM (2009) 576 final, COM (2009) 501 final, COM (2009) 502 final, COM (2009) 503 final, the Committee of European Banking Supervisors (CEBS) published the Interim report on liquidity buffers & survival periods, 17 March 2009, and the Consultation paper on draft guidelines for liquidity buffers, 7 July 2009, CP28, both available at http://www.c-ebs.org/getdoc/ea5aa2f1-4395-4f06-9b0a-

uncoordinated multitude of approaches from various actors.[610] Thus, these initiatives could impair the accessibility of the law in this area. It follows that more restraint should be exercised by various actors, even in the light of uniform calls for the development of rules at various levels.

5.4.2.2. The role of non-state actors

The Dutch legislator has adopted restraint where private actors can provide rules themselves, which has also been visible in the development of the corporate governance code. This prominent role can also be seen in the light of increasing need for laws that can easily be amended. Consequently, non-state actors have played a prominent role in the development of reionforced codes of conduct. The reinforcement of initial voluntary self-regulation has increased the influence of private actors on potential third parties.

5.4.2.3. Limitations on the role of non-state actors

Interestingly, since the credit crunch, corporate governance has been described as 'one of the most important failures of the present crisis', leading to gaps in rules and norms, for example for the supervision on hedge funds,[611] but it is not clear whether this is due to the closed process in which corporate governance codes are developed, or whether this lack of compliance is something that cannot be enforced by the development of new rules.[612] Generally, however, criticism on the prominent role of private actors seems rather rare.

However, Dutch state actors have recognised the need for control mechanisms. In particular, the legislator[613] has recognised the potential shortcomings of self-regulation and the risk of *Fremdbestimmung* if self-regulation is established in areas where stakeholders have unequal bargaining positions. Thus, unequal positions of stakeholders may be a reason to opt for legislation rather than alternative regulation. This is the case, according to the Dutch government, if participation requires a level of expertise that is unlikely to be found in weaker parties. Corporate governance may be one of those areas and safeguards reminiscent of German safeguards have accordingly been developed.

1) The need for transparency in the development of corporate governance standards, and the possibility for actors to participate through the use of consultations.

However, the question arises whether the consultation provided for sufficient time to respond (it was opened during the summer of 2008), and whether actors participating in it were sufficiently representative. Interestingly, Van Solinge and Nowak[614] criticised the lack of clarity on the question whether the corporate governance code, through the referral in article 3:291 par. 5 BW, became law.

2) Also, transparency on the compliance with corporate governance in annual accounts in article 3:291 par. 5 BW has been emphasised, while corporate governance codes simultaneously stipulated a larger role for shareholders.

45c05df8ab86/CP28.aspx, and the global plan for recovery and reform, statement from the G20 after the London summit, 2 April 2009, par. 13 et seq, available at http://www.londonsummit.gov.uk/resources/en/PDF/final-communique).

[610] G.T.M.J. Raaijmakers, 'De financiële markt en het ondernemingsrecht', *Ondernemingsrecht* 2009, 104.

[611] Report from the High-Level Group on Financial Supervision published on future financial regulation and supervision, par. 110 and 115, available at http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf, and G. Kirkpatrick, 'The corporate governance lessons from the financial crisis', OECD Report, *Financial Market Trends* 2009-1.

[612] J. Winter, 'Corporate governance en wat het recht niet vermag', *AA* 2012, p. 416.

[613] *Kamerstukken II*, 2003-2004, 29752, nr 2, p. 18-19.

[614] G.J. van Solinge, R. Nowak, 'Een krabbend anker', *WPNR* 6563 (2004).

3) The establishment of an adequately specialised judiciary. [615]

4) The development of these codes takes place within the legal framework of book 2 BW and the proposals for the development of these rules within well-established structures such as the SER

The criticism on corporate governance codes has not withheld the development of the banking code, modelled on the corporate governance code, but previous experiences with the corporate governance codes may be a reason for the emphasis of the banking committee on the reinforcement of the code.

The development of these control mechanisms are not visible at the European level. However, the role of non-state actors is subject to some control as the the European Commission exercises control over the actors participating in selected fora, particularly the European corporate governance forum.[616]

5.4.3. Collective bargaining

Paragraph 5.4.3.1. will consider instances of reinforced collective bargaining and paragraph 5.4.3.2. will turn to the role of non-state actors in these instances. Paragraph 5.4.3.3. will consider limitations on non-state actors' roles through the development of control mechanisms. Paragraph 5.4.3.4. will end with a plea for a framework on the basis of principles of private autonomy and *Fremdbestimmung*.

5.4.3.1. Instances of collective bargaining

The reinforcement of collective bargaining, both in collective contracts on the conditions of employment ('*collectieve arbeidsovereenkomst*', hereafter: 'CAO') and collective settlements, is a well-established form of co-regulation. In collective bargaining, parties directly establish the rules in the agreement of the parties that they represent, which rules become binding when sanctioned by state actors (the ministry of social affairs and employment and the judiciary). This paragraph will first describe the development of CAO's and the development of agreements with works councils.

- A CAO is agreed between unions and employers' organisations or, for large companies, individual employers, and it stipulates the terms and conditions of employment (ranging from wages to fringe benefits).[617]

Negotiations for CAO's take place within the framework of the '*poldermodel*', established by the government and stakeholders in 1982 in the Wassenaar Agreement.[618] Unions may, if they meet requirements of representativeness, require to be admitted to negotiations through the judiciary.[619] If negotiations are unsuccessful, employees can try to reinforce their demands with a strike.[620] In turn, employers can try to get an injunction against the strike. A CAO can be applicable within a specific branch, or for a specific company.[621] These CAO's usually have a national scope, but their range can

[615] *Kamerstukken II*, 2003-2004, 29752, nr 2, p. 20-22.
[616] See further http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm.
[617] As defined in article 1 par. 1 of the Law on Collective agreements on terms of employment ('*Wet CAO*').
[618] The (Dutch) text of the agreement is available at http://www.parlement.com/9291000/modulesf/ggektig0.
[619] Rb. Amsterdam 20 January 1982, *NJ* 1984, 101.
[620] See L.A.J. Schut, *Internationale normen in het Nederlandse stakingsrecht* (diss. Leiden), Den Haag: SDU 1996.
[621] The texts of CAO's for various branches are available via http://cao.startpagina.nl/.

be limited to have a regional or a local scope. Provisions in the BW[622] stipulate that in a CAO, parties can deviate from otherwise mandatory law. Apart from binding the contracting parties themselves, article 9 on the law for CAO's (hereafter: '*Wet CAO*') stipulates that CAO's are also binding on the members of the unions that are a contracting party to the CAO. Article 12 and 13 Wet CAO stipulate that a clause within an individual labour contract between parties who are bound to the CAO (the individual employer and the employee who is a member to the union that is a contracting party to the CAO) is void and replaced by what the terms and conditions stipulated in the CAO. If issues are undecided in individual labour contracts, the terms and conditions in a CAO complement the individual contract. For employees who are not a member of one of the contracting unions, article 14 Wet CAO stipulates that the employer who is bound by the CAO is bound to comply with the CAO as regards contracts for employees who are not bound by the CAO. Article 10 Wet CAO stipulates that even if members cancel their membership, they remain bound to the CAO. However, the unbound employee cannot demand compliance with the CAO. The difference made between bound and unbound employees has been criticised, for example because an employer may not know what employees are members of contracting unions. Article 14 Wet CAO is often evaded by incorporating the CAO's within all individual labour contracts with a bound employer.[623] A collective agreement can be declared generally binding ('*algemeen verbindend*') for a sector under the Act of declaring CAO's binding or non-binding ('Wet AVV').[624] It has been argued that this competence should be reallocated to the Association for Labour ('*Stichting voor de Arbeid*') consisting of stakeholders,[625] an advice that has however not been acted upon. The suggestion was rejected by the majority of members of this organisation, who referred to the infringement of contractual freedom of parties bound to generally binding CAO's. If declared generally binding, a CAO may be considered hard law,[626] and it is applicable to all individual contracts, also contracts with non-bound employees.

- Article 32 par. 1 Act on Works Council ('Wet op de Ondernemingsraden', hereafter 'WOR') stipulates that parties negotiating CAO's and public bodies can delegate competences to works councils. Article 27 WOR makes clear that works councils need to give permission for provisions with regard to secondary terms of employment. Also, employers may also extend the competence of works councils through additional agreements, including negotiations on employment contracts, which may however not set aside CAO's.[627]

Differently than BV's, the agreements between the employer and works' councils are not directly binding for the employee, and only become binding when they have been incorporated in individual agreements or if CAO's stipulate that the agreements will be directly applicable.

- The collective settlement of claims the Dutch Class Action (Financial Settlement) Act ('*WCAM*') in 2005.

Previously, article 6:240 Civil Code and article 3:305a Civil Code[628] already established a legal action for interests groups.[629] Under the Act, parties first have to reach an agreement on the collective financial settlement before it can be submitted to the courts. Article 7:907 BW stipulates that the court

[622] In articles 7:628 par. 7, 7:629a par. 7, 7:634 par. 3, 7:638 par. 2, 7:639 par. 2, 7:652 par. 6, 7:655 par. 2, 7:658b par. 7, 7:664, par. 1, sub c, 7:668a par. 5, 7:670 par. 13, and 7:672, par. 5, 7, 8 BW.
[623] Asser/Heerma van Voss 2008 (7-V), nr. 453.
[624] See for an overview of the CAO's that have been declared generally binding http://cao.szw.nl/.
[625] Stichting van de Arbeid, *Advies inzake het beleid ten aanzien van het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten*, October 1989, p. 36-37.
[626] HR 31 mei 2002, *NJ* 2003, 110 (Ziekenhuis De Heel); HR 14 februari 2003, *NJ* 2003, 301 (Thuiszorg Centraal Twente). See for a CAO that was not declared generally binding but that was considered 'law' HR 20 October 2006, *NJ* 2006, 573.
[627] Asser/Heerma van Voss 2008 (7-V), nr. 480.
[628] This provision is limited, mostly because it excludes the possibility for a claim of damages.
[629] However, before this provision was enacted, in some cases a collective action was accepted: See for example HR 1 July 1983 (LSV/Staat), *NJ* 1984, 360, HR 1 July 1983, *RvdW* 1983, 131.

can, on the joint request of parties, decide that the settlement becomes binding on an entire group of claimants, unless a claimants opts out of the settlement. In reaching a collective settlement, claimants can use article 3:305a Civil Code to decide on points of law relevant for the collective settlement. [630]

At the European level, possibilities for collective negotiations have also been developed in the European Social Dialogue.

Thus, various instances of collective bargaining can be found, especially at the national level.

5.4.3.2. The role of non-state actors: exercising fundamental rights?

The role of non-state actors is consitutionally protected, even though the freedom to collectively negotiate has not been recognised as such. However, article 8 Gw does recognise the freedom of association, and international treaties, especially article 11 ECHR and article 6 par. 4 European Social Charter that both have direct effect[631] have respectively also recognized the right to association and the right to strike.

The constitutionally protected role of non-state actors has however not withheld the Dutch legislator from pressuring the conclusion of agreements that are considered in the interest of the Dutch economy, as becomes apparent from the Wassenaar agreement, even though the freedom of contract from contract parties has been emphasized. Thus, although collective bargaining is seen against the background of constitutional rights, it has also been considered as a means to develop employment contracts in a manner beneficial for the public interest. Thus, the role of non-state actors may be made subject to the public interest.

The possibility for mass settlement has generally not been considered within article 8 GW or international provisions on the right to association. Articles 7:900 and seq BW take parties' freedom to contract as a starting point. The need to take into account party autonomy has been emphasised, although this has not expressly been recognised as a constitutional right. Nevertheless, private parties have been granted an important role in initiating and negotiating settlements, which was in accordance with previous case law as well as article 3:305a BW that already enabled stakeholder organisations to bring a collective claim.[632]

5.4.3.3. Limitations on the role of non-state actors?

At the national level, debate has not, as such, focussed on questions of *Fremdbestimmung*.[633] In contrast, arguments for retroactive effect and aftereffect of generally

[630] Well-known cases in which collective settlements have been reached include *DES*, agreement declared binding by the Amsterdam Court of Appeal 1 June 2006, LNJ AX6440**,** *Dexia*, agreement declared binding by the Amsterdam Court of Appeal 25 June 2007, LJN AZ7033, *Shell*, agreement declared binding by the Amsterdam Court of Appeal 29 May 2009, LJN BI5744, *Vie d'Or*, agreement declared binding by the Amsterdam Court of Appeal, 29 April 2009, *LJN* BI2717. Other case law on article 3:305a Civil Code includes HR 5 June 2009, *RvdW* 2009, 565, HR 14 June 2002, *NJ* 2003, 689 (NVV c.s./Staat), and HR 7 November 1997 (Philips/VEB), *NJ* 1998, 268. The *Consumentenbond* also assists Dutch consumers involved in foreign claims, see for examples A.J.C. Zwinkels, 'Productveiligheid en –aansprakelijkheid. Ervaringen vande Consumentenbond', *TvC* 1998, p. 316-321.

[631] Other relevant international treaties include article 22 ICCPR, article 5 of the European Social Charter, and article 8 ICESC. The right to collective negotiations is recognised in article 6 European Social charter and the ILO Convention on the right to organise and collective bargaining 1949, C98.

[632] Kamerstukken II, 1991-1992, 22486, nr. 3.

[633] Comp. however C.E. du Perron, *Overeenkomst en derden*, p. 72, who characterises thebinding force of CAO's as partially heternomous - a source of obligations not dependant upon parties' wills, but on the law – and partially autonomous – a source of binding force as employees can prevent being bound by a CAO by cancelling their membership to a union. In his analysis, however, the law as a source of binding obligations is considered as a breach of third parties' private autonomy, whereas in the German legal order, the democratic legitimacy of these rules is emphasised, and *Fremdbestimmung* is, in the German view, more likely to arise if 'hybrid' forms between the law and conract, developed by private actors likely pursuing their own rather than the public interest, are the source of obligations.

binding CAO's have been made and recognised.[634] Nevertheless, CAO's may also meet with problems.[635]

Differently than the German legal order, the Dutch legal order does not generally assume that unions are in principle better capable of defending employees' rights, and CAO's do not fall within a sort of *Richtigkeitsgewähr*. Consequently, mandatory law imposes some restraints on negotiating parties. Particularly, article 2 par. 5 Wet AVV that prohibits some clauses in CAO's aimed at excluding or limiting the rights of employees.

If CAO's are declared generally binding, this may affect third parties' rights and obligations. Notwithstanding this influence, the decision to declare a CAO generally applicable is not open to appeal under article 8:2 Awb. However, articles 4 and 6 Wet AVV note that parties can object to declaring a CAO generally binding or non-binding prior to the declaration. Unless parties' objections are clearly unfounded, the decision making process can only be continued once a reaction to the objections have been given.

It has been recognised that works' councils may be less independent than unions, but as the agreements between employers and works' councils are not directly binding, this will not generally lead to problems and the need to develop control mechanisms is not apparent.

The Dutch legislator has acknowledged the need to guarantee third parties' access to the judiciary in accordance with article 17 Gw and article 6 ECHR and the need to compensate for potential *Fremdbestimmung*, by providing parties with a possibility to opt out of settlements once they have been established, in accordance with article 7:908 par. 3 BW. Moreover, claimants may seek to influence the views of the judge by filing petitions.[636] The possibilities for parties to challenge the declaration that a collective agreement will become generally binding has however been limited in article 1018 Rv.

Additionally, the Dutch legislator[637] has also sought to prevent that an increasing amount of organisations seeks to represent claimants solely on a commercial basis, and in that light approved the development of self-regulation, in particular the "claimcode" that includes guidelines on the tasks, transparency and governance of these organisations on the basis of its articles of association.[638] It is however unclear why especially commercial organisations would choose to comply with this code. Also, it has been suggested to include a provision which enables the judge to reject claims if these claims are unlikely to be in the interests of claimants. A monitoring committee will monitor the enforcement of the code.

5.4.3.4. A plea for a framework on the basis of principles of private autonomy and *Fremdbestimmung*

Can starting points be found for developing a framework on the basis of principles of private autonomy and *Fremdbestimmung?*

Current control mechanisms, including mandatory law and opt-out possibilities, as well as suggestions for more control mechanisms could be seen in this light. Particularly, suggestions to evaluate the notion of representativeness of non-state actors in the negotiations of CAO's, in accordance with the Wet AVV, and in the negotiations on mass settlements in article 7:907 par. 3 sub f BW could provide a starting point to consider what

[634] Asser/Heerma van Voss 2008 (7-V), nr. 465.
[635] G.J.J. Heerma van Voss, 'Medezeggenschap van werknemers met betrekking tot arbeidsvoorwaarden', *RM Themis* 1999, p. 269.
[636] Kamerstukken II, 2003-2004, 29414, nr. 3, p. 4.
[637] Kamerstukken II, 2011-2012, 33126, nr. 3.
[638] Available at http://www.consumentenbond.nl/morello-bestanden/716993/compljuniclaimcodecomm2011.pdf.

role non-state actors should play, and if they play a prominent role, what requirements can be made of these actors?

Requirements of representativeness currently leave much room for discretion, of either the Minister declaring a CAO generally binding or non-binding, or for a judge declaring a mass settlement contract binding.[639] Interestingly, the Dutch Association for the Judiciary[640] has argued for additional measures to guarantee representativeness, which should prevent that private actors seek to represent victims in mass damages cases for commercial aims. Los[641] notes that the standard of representativeness, as well as the process through which the settlement is achieved are relevant for the reasonableness of the compensation in the settlement. Similarly, in the area of CAO's, more clarity on the question when requests for declaring a CAO generally binding would in turn increase the predictability and enhance the chance that a visible consistent approach will be adopted towards declaring CAO's generally binding will be adopted.

Questions of private autonomy and *Fremdbestimmung* may arise from proposals for reform. With regard to CAO's and works councils, Heerma van Voss[642] notes the differences between the role of Dutch and German works councils and notes that the direct effect of BV's should also be introduced in Dutch law, as that would be in accordance with the increasing use of agreements between works council and employers. Notably, this would enhance the role of Dutch works' councils, which in turn raises the question whether considerations of *Fremdbestimmung* should also play a role in the Dutch legal order. In The Netherlands, the possibility that unions are more independent than works' councils may moreover be a reason to establish control mechanisms compensating for a weaker bargaining position of works councils.

This framework should not mean that the benefits of alternative regulation are overlooked. Accordingly, CAO's are generally considered in the interest of employees, and the introduction of mass settlements especially served the reduction of the amount of procedures as well as predictability. The framework would however serve to critically consider the role of non-state actors in reinforced collective bargaining and consider points for improvement. The development of a framework may also prompt a more critical perspective on the role of non-state actors in the development of framework agreements.

Importantly, however, the development of a Dutch framework on the basis of notions of private autonomy and *Fremdbestimmung* may lead to problems if it leads to a more critical approach to European forms of alternative regulation. However, such a framework may also be a starting point for a more consistent approach to the development of alternative regulation that may also prompt the European legislator to consider alternative regulation more carefully.

5.4.4. Conclusion on state actors and non-state actors

What is the role of state and non-state actors in the development of private law through co-regulation?

[639] R.R.A. Henkemans, 'De wetgevende taak van de rechter bij massaschade', in: N. van den Berg, R.R.A. Henkemans, A. Timmer (eds.), *Massaclaims, Class actions op z'n Nederlands*, Ars Aequi Libri: Nijmegen 2007, p. 40.
[640] Nederlandse Vereniging voor Rechtspraak, *Wetgevingsadvies Wijziging van de Wet collectieve afwikkeling massaschade*, 2011, p. 1-2.
[641] W.J.J. Los, 'Toepassing van de WCAM. Bespiegelingen over de rol en de taak van de rechter', in: W.J.J. Los et al., *Collectieve acties in het algemeen en de WCAM in het bijzonder*, BJU: The Hague 2013, p. 29
[642] G.J.J. Heerma van Voss, 'Medezeggenschap van werknemers met betrekking tot arbeidsvoorwaarden', *RM Themis* 1999, p.270-271.

Generally, non-state actors are granted a central role in the development of co-regulation. At the national level, state actors allow a large role for non-state actors.[643] Non-state actors play a prominent role in the development of mass settlements, CAO's, the corporate governance code and the banking code. At the European level, non-state actors play a prominent role through referral and similar forms of new governance.

Dutch actors, like European state actors, have exercised restraint in imposing restraints on the role of non-state actors. However, Dutch state actors have recognised that private actors do not necessarily pursue the public interest but also their own interests and have established control mechanisms, which seem relatively mild in comparison to German control mechanisms, and strict in comparison with European control mechanisms.

These mechanisms entail the development of platforms for negotiations between actors with unequal bargaining positions, mandatory law, opt-out possibilities, requirements of representativeness and inclusiveness and the development of additional self-regulation, but judicial control is not as visibly developed as in the German legal order. Interestingly, these control mechanisms are more diverse than mechanisms found in the German legal order, they have been established more on an ad hoc basis and not on the basis of pre-exisitng concerns over *Fremdbestimmung*.

Comparison between the role of non-state actors at the national and the European level, in the previous chapter, shows that the roles of non-state actors and state actors under Dutch and European law do not differ as drastically as the role of actors in the German framework and under European law, which make the interdependence between actors at the national and European level less pronounced. That does however not mean that parties may not strengthen or weaken one another's initiatives.

Interdependence has become similarly visible between state and non-state actors; both Dutch and European state actors have recognised the benefits of alternative regulation.

Even though control mechanisms have not been developed to prevent or mitigate *Fremdbestimmung* as such, ideas of private autonomy and *Fremdbestimmung* could form a suitable basis for developing a more consistent and therefore predictable approach to the development of alternative regulation and the role of state and non-state actors, which would also benefit the quality of European private law. Particularly, the predictability and accessibility of private law could be improved by developing a framework, as these mechanisms draw more attention to possible rules that parties may becme bound by. Moreover, providing parties with an opportunity to influence rules that they will be subjected to is in accordance with legal views on justice.

Such a framework should not stand in the way of developing alternative regulation, but rather offer a critical perspective that may be a starting point for improving alternative regulation, without however subjecting European forms of alternative regulation to national standards. The benefits of alternative regulation should moreover not be overlooked.

The interdependence between actors leads to a corresponding need for interaction, both between state actors at the national and the European level and between state and non-state actors.

Sufficient interaction between actors is important if private autonomy and *Fremdbestimmung* are used as underlying principles to develop a framework to determine actors' roles. Sufficient interaction should prevent that a framework is developed which undermines European initiatives. In turn, European initiatives should not ignore national

[643] M.-C. Menting, *Terra incognita: de functies van gedragscodes in het privaatrecht* (master thesis) Tilburg 2011, p. 94 et seq characterises the approach of the Dutch legislator as a passive, bottom-up approach.

objections to European forms of alternative regulation. Instead, these objections could prompt European actors to improve European alternative regulation.

5.5. Non-state actors

This paragraph will ask what role non-state actors have played in the development of private law through self-regulation, and ask how actors have approached these developments, and how that may affect the use of self-regulation in the development of private law in the Dutch legal order.

Private actors form a group that are not competent to establlish binding rules. Instead, they may develop self-regulation.[644]

The Dutch legal order generally distinguishes between 'contractual' self-regulation, and a much wider category of non-contractual forms of self-regulation. The Dutch legal order does not usually distinguish between self-regulation established on the basis of articles of association and one-sided juridical acts. Importantly, Dutch law does not consider one-sided juridical acts as non-binding. To the contrary, one-sided juridical acts may be binding under Dutch law, depending on the question whether actors making these declarations intend to be legally bound – thus constituting a juridical act by making a declaration – and whether actors have justifiably relied on them.[645] Consequently, although there has been distinguished between 'contractual' and other forms of self-regulation, no such distinction is apparent between self-regulation based on articles of association and one-sided declarations.[646] Instead, distinctions are made between, for example, self-regulation on technical matters, self-regulation targeted at affecting individuals' behaviour, such as codes of conduct, internal or external self-regulation, or one-sided and multilateral for of self-regulation.[647]

One of the reasons for making this distinction is that in cases where self-regulation is incorporated in a contract, enforcement is often not problematic, but for other forms of self-regulation, enforcement is a central problem.[648] Yet this does not necessarily mean that one *cannot* make this distinction. Forms of self-regulation that would typically be associated with self-regulation based on articles of association typically fall under disciplinary rules ('*tuchtrecht*'), either voluntary or compulsory.[649] Typically, voluntary disciplinary law (also referred to as 'vrijwillig *verenigingstuchtrecht*') is not targeted at ensuring third parties' (for example consumers') contention or the public interest but rather at maintaining a high level of standards within a specific group.[650] This sort of '*tuchtrecht*'[651] has been considered as a legal area *sui generis* that does not fall within private law, or criminal law, or administrative

[644] Self-regulation can be understood as the making of rules and norms by both by contract parties or a group of persons or bodies binding contract parties or this group, and often, but not necessarily, other private actors that choose to be bound by the rules made through self-regulation. See previously chapter 1, footnote 3.
[645] Asser/Hartkamp/Sieburgh (2009) 6-III, nr 125 et seq.
[646] See for example B. Baarsma et al, *Zelf doen? Inventarisatie van zelfregileringsinstrumenten*, Report for the Ministry for Economic Affairs, 2003, available at http://www.debrancheorganisatie.nl/upload/File/Zelf%20doen.pdf.
[647] See for an overview I. Giesen, *Alternatieve regelgeving en privaatrecht*, Kluwer: Deventer 2007, p. 15-16.
[648] M. Loos, *De energieleveringsovereenkomst*, Kluwer: Tilburg 1998, p. 8.
[649] "Compulsory self-regulation" in this sense includes self-regulation on free professions , such as lawyers and physicians.
[650] For example N.J.H. Huls, M.A. Kleiboer, 'Is er een toekomst voor wettelijk niet hiërarchisch tuchtrecht?', *AA* 2002, p. **72.**
[651] Future referral to '*tuchtrecht*' will denote '*vrijwillig verenigingstuchtrecht*'.

law, which might explain why it is not typically characterised as self-regulation or alternative regulation in private law.

Accordingly, paragraph 5.5.1. will consider contractual self-regulation and paragraph 5.5.2. will consider self-regulation on the basis of articles of association. Paragraph 5.5.3. will consider self-regulation based on one-sided juridical acts and paragraph 5.5.4. will consider the usefulness of these categories in Dutch law. Paragraph 5.5.5. will end with a conclusion.

5.5.1. Contractual self-regulation

This paragraph will ask what role non-state actors play in the development of contractual self-regulation.

Paragraph 5.5.1.1. will consider the basis of the binding force of contracts under Dutch law and consider the role of actors. In the German legal order, the *Richtigkeitsgewär* provides a basis for determining in which cases parties' agreements will be enforced and which limtiations will be set on actors' roles.[652] If an equivalent of the *Richtigkeitsgewähr* can be discovered, this may provide more clarity on the role of actors. Notably, however, even if a Dutch equivalent to the *Richtigkeitsgewähr* can be established, it is likely that the Dutch legal order will evaluate this matter differently from the German legal order, where *Fremdbestimmung* in the absence of *Richtigkeitsgewähr* is seen against the background of article 2 GG. Paragraph 5.5.1.2. will turn to collective contracts, including collectively negotiated STC's, and paragraph 5.5.1.3 will consider model contracts. Paragraph 5.5.1.4. will turn to STC's, and paragraph 5.5.1.5. will end with a conclusion.

5.5.1.1. The role of contract parties

The Dutch legal order does not directly recognise the will of private actors as the source of obligations; rather, article 6:1 BW reiterates that obligations can only arise insofar as this follows from the law. Accordingly, article 3:33 BW stipulates that a juridical act requires an intention to establish a legal effect that has been made public. Article 3:35 BW stipulates that if parties have justifiably relied on the behaviour or statements of other parties, this may entail that these parties are bound. It is not clear whether the will of parties or the reliance of parties on that will is the source of obligation: article 3:35 BW both excludes the will as well as the declaration that differs from the will as the sole basis of parties' obligations.[653] The discussion in literature has accordingly focussed on the will and the reliance as the basis of obligations.[654] Notably, however, articles 3:33 and 35 BW were not drafted to resolve dogmatic issues; rather, they established a double basis for the binding force of contracts, parties' wills and parties' legitimate expectations, in accordance with previous case law.[655]

This dual basis has been criticised by authors[656] offering a correction on the combination of parties' wills and parties' justified expectations as a basis for the binding force of contracts, adding that the *causa*-principle, the legal cause for a contract, is also a principle underpinning the binding force of contracts.

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[652] The effect on the role of actors can be twofold: on the one hand, the *Richtigkeitsgewähr* provides a basis for a large amount of discretion for contract parties. On the other hand, the absence of the *Richtigkeitsgewähr* may be a reason to subject contracts to judicial evaluation, depending on the question whether contracts are deemed to have been established in a process that sufficiently reflects the will of both parties and thus prevents *Fremdbestimmung*

[653] Asser/Hartkamp/Sieburgh (2009), nr 125.

[654] Asser/Hartkamp/Sieburgh (2009), nr 126 et seq.

[655] Parl GS (Book 3), p. 164.

[656] J.H. Nieuwenhuis, *Drie beginselen van contractenrecht*, Kluwer: Deventer 1979.

Recently, the basis for the binding force of contracts has again been subject to debate. Nieuwenhuis[657] explains contracting as '*égoïsme à deux*', in line with the idea that parties negotiate a contract in their own interests. He emphasises that aside from their own interests, parties have to act in accordance with good faith, taking into account the justified interests of their contract party. Thus, parties' duties of care protect the autonomy of one of the contract parties. Similarly, Hartkamp and Sieburgh[658] note that the binding force of a contract is based on the party autonomy of *both* contract parties, in accordance with article 6:217 BW that stipulates that a contract is established by an offer that is accepted. Vranken[659] agrees with the importance of duties of care. He finds that these duties are at the core of contract law.

Accordingly, in a case where a consumer had traded in stock options and suffered a considerable loss, the Hoge Raad[660] held that the bank, as a professional contract party with considerable expertise, has a far-going duty of care, which had not been fulfilled by the repeated warnings of the bank and the experience of the consumer with stock trading. In other words, the duty of care may mean that a bank should refuse to execute the orders from its client, to protect the consumer against his own rashness, while the bank had also breached obligations flowing from administrative law that also aim to protect consumers. Thus, the decision emphasises the weakness of consumers that prevents them from making a rational decision in their own interests, which necessitates that the bank takes his interests into account.

These arguments do not make the importance of the negotiation process explicit.

Arguably, the negotiating process preceding contracts and amendments to contracts offers an interesting addition to the current justification of the binding force of contracts. Arguably, the idea of the negotiating process emphasises the wills of *both* parties in the contract, in accordance with Nieuwenhuis' idea of '*égoism a deux*'. In the negotiation process, it is necessary for parties to be able to rely on one another's behaviour – consequently, parties should take into account the legitimate interests of (potential) contract parties. Simultaneously, if negotiations show defects, because parties cannot negotiate on the same level as their contract partner, parties must take into account the interests of that party – a conclusion that is in line with the duties of care recognised in contract law. If the will of parties shows defects, because of mistake (article 6:228 BW), threat, deception, or abuse of parties' vulnerable circumstances (article 3:44 BW), the contract will be avoidable. In both cases, the defects in the negotiation process – that can be traced to a defect in parties' wills – entail that one party is able to impose his terms on the other party, thus breaching the autonomy of that party.

The weak position of parties, and the defective negotiation process between parties, may be a reason for the legislator to develop mandatory rules, in order to prevent that the stronger position of one party leads to unacceptable social or economical consequences,[661] or, in German law, *Fremdbestimmung*. This conclusion however leaves open the question

[657] J.H. Nieuwenhuis, *Paternalisme, fraternalisme, egoïsme* (valedictory address Leiden 2009), p. 4.
[658] Asser/Hartkamp/Sieburgh (2009), nr 41-42.
[659] J.B.M. Vranken, 'Over partijautonomie, contractsvrijheid en de grondslag van gebondenheid in het verbintenissenrecht', in: J.M. Barendrecht, M.A.B. Chao-Duivis, B.W.M. Nieskens-Isphording (eds.), *Beginselen van het contractenrecht*, Deventer: W.E.J. Tjeenk Willink, 2000, par. 15.
[660] HR 26 June 1998, *NJ* 1998, 660.
[661] Comp. C.E. du Perron, *Overeenkomst en derden*, p. 16-17 who distinguishes between control over the conclusion of a contract – in the case of defects of will– and the control over the content of the contract – as is the case for STC's, see below par. 5.5.1.4. However, the unequal position of parties may influence the legal position of the buyer. Thus, the control over the content of the contract is linked to the conclusion of the contract, which is also recognised in article 6:223 sub a BW that refers to circumstances during the formation of the contract in order to determine the fairness of STC's.

when these consequences become unacceptable, a conclusion that will often be the result of poltical negotiations in the legislature.

The idea of taking the negotiation process as a starting point is also in accordance with the causa principle[662] as the cause of the contract is inherent in negotiations.

In many everyday transactions, however, negotiations do not take place. Therefore, is a negotiation process an adequate and convincing explanation if negotiations are absent in everyday transactions? However, the idea of negotiation processes is not based on an empirical assessment of how often actual negotiations take place – in Germany, *Richtigkeitsgewähr* is also present if parties, rather than factually negotiating, focus on the price and quality of products, and choose to contract with the party that has the best combination of both. In these cases, factual negotiations need not take place – rather, the negotiation process is implicit. Accordingly, Du Perron[663] considers that the wills of parties, on which the binding force of contracts has been based, does not denote the factual free will, but the possibility to make choices, including the choice that parties eventually make.

This justification presupposes that the effect of the contract is limited to contract parties involved in negotiations, in accordance with the more general rule that contract parties cannot bind third parties.[664] Accordingly, the principle of the relativity of contract ('*relativiteitsbeginsel*') has been traced to the principle of party autonomy.[665] Article 1376 Old BW expressly stipulated that contracts are binding between parties and cannot be a source of obligations for third parties, either to their detriment or to their benefit, unless provided by article 1353 Old BW. In the drafting of the BW, the legislator has chosen not to include a similar provision, because it could stand in the way of the further development of the law. Even though the BW does not contain a similar provision, the law refers to the wills and the legitimate expectations of *parties*, which may bind a contract party to the contract – not a third party. Similarly, article 6:217 BW presupposes and offer and acceptance, and subsequent binding force, by parties. This principle is visible throughout the Union.[666]

This principle of the relativity of contract has become subject to various exceptions.[667] These binding effect of contract on third parties should only be permitted where the reasonableness of doing so is clearly apparent.[668] This reasonableness may well require that third parties have acted in a manner that justifies the obligation.

In in Quint/Te Poel[669], the Hoge Raad recognised unjustified enrichment as a source of obligations, declining a narrow interpretation of article 1269 Old BW that stipulated that the law or contracts are the source of obligations. In this case, Te Poel, brother of the contract party of Quint, was enriched as Quint had contracted to build houses on land that turned out to belong to the brother of the contract party. The contract party became insolvent and his brother became owner of the houses on the basis of accession. In cases such as these, the third party has a reason to foresee that an obligation will be imposed upon him. In this case, however, Quint had no claim on the basis of articles 658 and 1608 Old BW which obligated the contractor to check the public registers to verify questions of ownership of the land.

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[662] Previously, articles 1356 and 1371 Old BW stipulated that contracts should have a 'permitted cause' ('*geoorloofde oorzaak*'), without which it was invalid. Currently, the BW does not expressly require this. G.J. Scholten, 'De oorzaak van de verbintenis uit overeenkomst', *AA* 1985, p. 744 sets out that this principle can still be found throughout the BW.
[663] C.E. Du Perron, *Overeenkomst en derden*, p. 16.
[664] Asser/Hartkamp/Sieburgh (2009) nr 514.
[665] C.E. du Perron, *Overeenkomst en derden, Een analyse van de realitiviteit van de contractenwerking*, The Hague 1999, p. 9.
[666] See for an overview the rights of third parties from contracts to their benefit the DCFR, notes to article II-9:301, p. 647-648.
[667] See for examples of these exceptions J.L.P. Cahen, *Overeenkomst en derden*. Kluwer: Deventer 2004.
[668] Parl GS (Book 6), p. 917-918. See for an overview of case law and literature C.E, du Perron, *Overeenkomst en derden*, p. 82-83.
[669] HR 30 January 1959, *NJ* 191959, 548.

Thus, contract parties have considerable room to enter into contracts with one another. Their role is in accordance with principles of party autonomy and legitimate expectations. The negotiation process is an interesting additional explanation. However, the role of contract parties may in some cases be more extensive than is the case under German law, as they are able to bind third parties. In German law, this may well meet with objections of *Fremdbestimmung*. However, that does not mean that Dutch law does not recognise the importance of parties' autonomy and problems of *Fremdbestimmung*; rather, *Fremdbestimmung* may be justified if parties acted in a manner that justifies imposing obligations on them.

5.5.1.2. Collective contracts

This paragraph will consider instances of collective bargaining and ask what role actors play in the development of private law through collectively negotiated contracts.

- The collective negotiations on STC's in consumer contracts undoubtedly form the most prominent example of collective bargaining.[670]

The STC's established within this framework generally are applicable in contracts for the sale of consumer goods.[671] STC's established within this framework include the STC's for mail-order businesses,[672] the general banking conditions,[673] the general conditions for individuals and the guarantees used by BOVAG (the representative organisation for the trade in personal transport),[674] the travel terms and conditions used by the Dutch Association of Travel Agents and Tour Operators ('*Algemene Nederlandse Vereniging van Reisondernemingen*', 'ANVR'),[675] standard contract terms used by energy producers, traders and retailers in the Netherlands (represented by EnergieNed),[676] standard contract terms used by the Association for the Conciliation for real estate (representing Dutch real estate agents, '*Vereniging voor de Bemiddeling van Onroerend Goed*', VBO),[677] the relocation businesses (represented by the Cooperating Departments for Relocations and furniture transport, '*Samenwerkende Vakafdelingen Verhuizen en Meubeltransport*', 'SAVAM'),[678] the referential model for internet access,[679] general conditions used in child care,[680] and the general conditions used in the trade of non-food retail products , as agreed by the Central Branch Association for Living ('*Centrale Brancheverenigingen Wonen*', 'CBW').[681]

- Various instances of collective bargaining, usually for specific groups of consumers and for specific contracts.

For instance, the *Vastelastenbond* states that it is an organisation of consumers that bargains collectively to gain advantageous contracts for electricity, insurance, internet and mobile phone

[670] Asser/Vranken 2005 (1-III), nr. 88.
[671] Coordinatiegroep Zelfregulering, *Jaarverslag 2008*, CZ/352, 2009, (Annual Report 2008) , see: http://www.ser.nl/~/media/Files/Internet/Publicaties/Overige/2000_2010/2009/CZjaarverslag2008.ashx
[672] Available at http://www.thuiswinkel.org/bedrijven/thuiswinkel_waarborg/algemene_voorwaarden.html.
[673] Available at http://www.nvb.nl/scrivo/asset.php?id=291360.
[674] Available at http://www.bovag.nl/index.php?pageID=34.
[675] Available at http://www.anvr.travel/opreis.php?opreis_id=1282.
[676] Available at http://www.energiened.nl/_upload/bestellingen/publicaties/00000227.pdf.
[677] Available at http://www.vbo.nl/files/Consumentvoorwaarden%20juni%202007.pdf.
[678] Available at http://www.erkendeverhuizers.nl/CMS5/upload/docs/alg_voorwaarden_Brochure.pdf.
[679] Available at http://www.ser.nl/nl/Taken/Zelfregulering/Consumentenvoorwaarden/Praktische%20Informatie/~/media/Files/Internet/Consumentenvoorwaarden/AV/cz_67%20pdf.ashx, used for example by Tele2, XS4All, KPN, and Telfort.
[680] Available at http://media.leidenuniv.nl/legacy/alg_vw_kinderopvang2005_1sept2005.pdf.
[681] Available at http://www.cbw-erkend.nl/websites/cbw_consumenten/docs/CBW-algemene-voorwaarden.pdf.

subscriptions for its members.[682] Another example of collective bargaining is the entering into collective contracts with health-care insurers, by employers,[683] or unions.[684] Other new examples of collective bargaining are online collective bargaining platforms, in which providers offer a platform for businesses to offer goods or services with considerable discounts, provided that enough people accept this offer, which ideally results in the promoting of these offers through social media. Examples of these platforms are Groupon[685] and Groupdeal.[686] Although the idea is that it is advantageous for both consumers and sellers to give big groups of consumers reduction, the terms of these platforms that do not necessarily represent consumers, are not necessarily beneficial.[687] Consumers have however encountered problems.[688]

At the European level, instances of collective bargaining have also been encouraged, for example in the area of mortgages[689] and package travel.[690]

Thus, private actors have recognised the added value of collective negotiations. The Dutch legislator has similarly recognised the added value of these negotiations and has not stood in the way of collective contracts more generally, that have also been entered into by state actors.[691]

However, as parties in negotiations may not have an equal bargaining position, the quesiton arises whether control echanisms should not be developed. Notably, however, the collectrive negotiations on STC's take place within the framework of the Coordination Group on Negotiations for Self-regulation ('*Coordinatiegroep Zelfreguleringsoverleg*'),[692] an independent organisation facilitating negotiations between branch organisations and consumer organisations.[693] Thus, negotiations are encouraged, but take place in a controlled environment that allows for some overview and control.

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[682] See http://www.vastelastenbond.nl/over-de-vastelastenbond.html.
[683] Examples of these contracts with insurers: Tilburg university and CZ (http://www.uvt.nl/medewerkers/gezondheid/ziek/ziektekosten/collectieve-verzekering/), Leiden university and Zorg en Zekerheid (http://www.medewerkers.leidenuniv.nl/arbeidsvoorwaarden-personeelsbeleid/zorgverzekering/collectieve-zorgverzekering.html), Nijmegen university also offers its students a collective health care insurance (http://www.ru.nl/studenten/regelingen/collectieve/). The Netherlands Association for medium to small businesses (Midden- en Kleinbedrijf, MKB) provides information for collective health insurance at its website, see: http://www.mkbservicedesk.nl/479/hoe-regel-collectieve-zorgverzekering.htm.
[684] For example CNV (http://www.cnv.nl/ziekte-en-zorg/cnv-zorgverzekering/cnv-zorgverzekering/), or FNV (http://www.menzis.nl/web/Consumenten/Klantenservice/FormulierenEnDocumenten/VerzekeringAanvragen/AanvragenCollectieveZorgverzekeringFNV.htm).
[685] See further http://www.groupon.nl/how-does-groupon-work.
[686] This is a relatively new (2010) Dutch-based platform, offering discounts on goods and services, per city. See further http://www.groupdeal.nl/.
[687] Thus, the STC's of Groupdeal (http://www.groupdeal.nl/algemene-voorwaarden/) stipulates that in case of disputes, arbitration will be followed in Amsterdam, and if settlement is not possible, then the Amsterdam courts will be competent, which is hard to reconcile with CJEU case law.
[688] See for example http://www.jouwervaringen.nl/groupon/, as well as http://www.trosradar.nl/uitzending/archief/detail/aflevering/24-10-2011/groupon/.
[689] See previously par. 4.5.1.2.1.
[690] See previously chapter 4.5.1.2.1.
[691] For example the collective contracts entered into by municipalities across The Netherlands, usually for inhabitants with an income below a threshold specified by the municipality, from smaller municipalities like Oisterwijk (http://www.oisterwijk.nl/smartsite6176.htm) or Wijchen (http://www.wijchen.nl/nl/zorg_en_ondersteuning/inkomensondersteuning/_/Collectieve_ziektekostenverzekering.html) to cities like Maastricht, (http://www.maastricht.nl/web/GemeenteLoket/Alle-producten-en-diensten/Productpagina.htm?dbid=793&typeofpage=79906), Rotterdam (http://www.monitor.nl/ziek.html?http://www.monitor.nl/s_1982_all_.htm), Groningen, (http://gemeente.groningen.nl/b-w-besluiten/12900), and Amstelveen, (http://www.amstelveen.nl/web/show?id=131238&langid=43&dbid=408&typeofpage=44744).
[692] The group is established on 15 March 1996, on the basis of article 2 and 43 Law on Business Organisation ('*Wet op de Bedrijfsorganisatie*').
[693] In view of the legislative framework in which both the drafting and the enforcement of STC's take place, the question arises whether or not STC's can be characterised as co-regulation, especially as collective negotiation are facilitated by the legislator (see for example Z.D. Laclé and A.C.M. Meuwese, *Self-regulation in the Netherlands*, NEWGOV Working paper 2006, p. 4, at http://www.eu-newgov.org/database/DELIV/DLTFIbD09d_Final_Chapters_on_self-regulation_The_Netherlands.pdf). Despite the legislative framework, STC's should not be characterised as co-regulation. The presence of a legislative framework (in this case especially article 6:231 et seq Civil Code) does not necessarily imply that rules can be characterised as co-regulation. Moreover, STC's are part of contracts negotiated by parties and they are not 'hard law' after the intervention of the legislator or

5.5.1.3. Model contracts

This paragraph will look at instances of model contracts and consider the role of actors in the development of private law through model contracts.

Both at the national and international level, instances of model contracts may be found:

- The use of model contract provided by professional associations or sector associations to their members dates back a considerable time.[694]

- Model contracts may also be established by collective bargaining

For example, the model contract of sale (in the form of a deed) established by the consumers' association, the Dutch Association for home owners ('*Vereniging Eigen Huis*') and the Dutch Association for Real Estate Agents ('*Nederlandse Vereniging voor Makelaars en Vastgoeddeskundigen*').[695]

- The International Chamber of Commerce ('ICC') provides a number of often-used models and terms and conditions, deviating from national non-mandatory rules.

Important models[696] are for example the ICC Uniform Customs and Practices for Documentary Credits (endorsed by UNCITRAL[697]), or Uniform Rules for Contract Guarantees. De Ly[698] describes the legal nature of the Incoterms as controversial; there is debate as to whether the Incoterms should be seen as customary international law.

Van Erp[699] has argued that model contracts do not fall within the definition of article 6:231 sub a BW and thus need not be subjected to judicial evaluation imposed on STC's, as this would undermine the use of model contracts aimed to further predictability. Notably, if terms in often-used models are subjected to articles 6:233 et seq BW, parts of the model contracts should be declared invalid. Yet model contracts may also contain guarantees that improve consumers' position.[700]

The freedom of contract parties to draft model contracts and the lack of judicial evaluation leave a prominent role for private actors, both at a national and international level. State actors have a less prominent role than is the case in the German legal order.

Similarly, at the European, the use of model contracts is a well-established way to facilitate transactions across borders, and a large range of freedom is accordingly left to contract parties.

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the judiciary; they become binding through their incorporation in contracts. Furthermore, despite the framework in which STC's are negotiated, STC's are not formed in cooperation with state actors, and the enforcement is left to private actors.

[694] In 1936, the International Chamber of Commerce introduced standard trade definitions most commonly used in international sale, see http://www.iccwbo.org/incoterms/id3042/index.html, accessed 15 October 2009.

[695] There is debate as to whether the standard contract provides a guarantee for consumers:, on which, and differently C.M.H. Vlaanderen, 'Over (on)bekendheidsverklaringen en conformiteit in de NVM-koopakte', *WPNR* 6410 (2000), p. 514-519.

[696] See for a more complete overview of the various rules, models and codes the website of the ICC: http://www.iccwbo.org/.

[697] Resolution UNCITRAL on possible future work in e-commerce, Report of the UN Commission on International Trade law, 42nd session (29 June-17 July 2009), General Assembly, 64th session, Supplement no. 17, p. 70.

[698] F. de Ly, *International business law and lex mercatoria*, North Holland: The Hague 1992, p. 173-174. For example P. Scholten, *Algemeen Deel*, 1974, nr. 23 regards international self-regulation through – for example – the York-Antwerp rules as related to customary international law.

[699] J.H.M. van Erp, 'De NVM-koopakte: géén algemene voorwaarden', *WPNR* 6190 (1995).

[700] HR 23 December 2005, *NJ* 2010, 62 on which J.J. Dammingh, 'Non-conformiteit en de NVM-koopakte', *TvC* 2009-3, p. 120-128.

5.5.1.4. STC's

This paragraph will consider instances of STC's and ask what role actors play in the development of private law through STC's.

The use of STC's is widespread:

- The use of model STC's, provided by professional associations or sector associations to their members, date back a considerable time.[701]

- At several instances,[702] the European Commission has unsuccessfully called for and announced developments of EU-wide STC's, including business to business (B2B) and business to government (B2G) contracts.

- International organisations have developed STC's. A prominent example is the ICC Hardship Clause 2003.

Van Beukering-Rosmuller[703] argues that in this field, notwithstanding diverging national rules on hardship, self-regulation is seen as desirable as long-term contracts, in which there are large financial stakes, are vulnerable to unforeseen events such as war or natural calamities.

Thus, both at the national and the international level, non-state actors play an important role in drafting STC's. The Dutch legislator has facilitated collectively negotiated STC's, and private actors accordingly play a prominent role in the drafting and negotiating STC's.

However, various control mechanisms have been developed that limit contract parties' roles.

1. Articles 6:231 et eq BW, that also implement Directive 93/13, provide that STC's can be subjected to judicial evaluation

The legislator has expressly pointed to the lack of negotiations in the drafting of one-sided STC's, which formed a reason to provide legislation on STC's. However, the Dutch legislator has adopted an especially critical approach towards the use of STC's in consumer contracts, and is more lenient with regard to business contracts. Accordingly, article 6:235 BW provides that articles 6:233 and 234 BW are not applicable to large businesses. The Dutch legislator also adopts a lenient approach towards international business contracts, as article 6:247 BW stipulates that these contracts do not fall within the scope of articles 6:231 et seq BW. Clauses in international business contracts may still be subjected to judicial control under article 6:248 BW, but the Hoge Raad has generally exercised restraint in the evaluation of these clauses.[704]

This control mechanism also provides stakehodlers with the possibility to challenge the fairness of STC's. Article 6:240 Civil Code gives interest groups an action in case of unfair contract terms. This action can also be used preventively, for example if a branch organisation provides unfair contract terms in the model standard contract terms it provides to its members.[705] After the adoption of

[701] In 1936, the International Chamber of Commerce introduced standard trade definitions most commonly used in international sale, see http://www.iccwbo.org/incoterms/id3042/index.html, accessed 15 October 2009.
[702] Communication on European contract law COM (2001) 398 final, nr. 56, Action plan for a more coherent European contract law COM (2003) 68 final, nr. 84-88, European contract law and the revision of the *acquis*: The way forward COM (2004) 651 final, par. 2.2.
[703] E.J.M. van Beukering-Rosmuller, 'Imprévision en zelfregulering', *NTBR* 2006-2, par. 3.1.
[704] See further H. Schelhaas, 'Pacta sunt servanda bij commerciële contracten', *NTBR* 2008, 21,
[705] HR 16 May 1997, *NJ* 2000, 1.

Directive 98/27 on injunctions for the protection of consumers' interests, foreign interest groups also have the possibility to challenge unfair contract terms through article 6:240 Civil Code,[706] and organisations like the Dutch Consumers' Association ('*Consumentenbond*') or the Consumers' authority ('*Consumentenautoriteit*') should be able to start an action abroad. However, article 6:240 par. 4 Civil Code limits this action: if a claimant has not given the other party the opportunity to negotiate on the standard terms and conditions, the claimant shall be inadmissible. Thus, private actors have a considerable role in the drafting and the enforcement of STC's.

2. Two-sided STC's that have been negotiated collectively are considered less likely to be unfair, as becomes apparent from article 6:233 sub a BW that refers to the way in which the STC's have been drafted in the assessment of the fairness of terms. Thus, collective negotiations can be seen as a control mechanism that limtis the chance of unfair STC's.

Thus, although the role of contract parties is subjected to restrictions, especially in business to consumer contracts, control mechanisms also leave a considerable role for respectively stakeholders challenging the fairness of STC's and parties involved in collectively negotiations on STC's.

At the European level, the need to protect consumers from unfair contract terms has led to the introduction of judicial evaluation of STC's under Directive 93/13 on unfair contract terms. However, the European legislator also encourages stakeholders to challenge STC's and has also, through Directive 98/27 on injunctions for the protection of consumers' interests, obliged national actors to enable foreign stakeholders to challenge STC's. Moreover, parties to contracts that do not fall within the scope of Directive 93/13 have considerable room.

5.5.1.5. Conclusion on contractual self-regulation

Both the Dutch and the European legislator leave contract parties with considerable room. Notably, the dual basis of binding force of contracts has led to criticism and does not provide a consistent, predictable view on the role of private parties in contractual self-regulation. If the negotiation process serves as an additional justification, this may provide more clarity, as this justification offers a consistent basis for upholding or not upholding contractual self-regulation. This additional justification is in accordance with the recognition of the added value of *collective* negotiations, and the emphasis of the lack of negotiations in the use of STC's.

5.5.2. Self-regulation on the basis of articles of association: '*tuchtrecht*'

This paragraph ask what role private actors play in the development of private law through self-regulation based on articles of association, '*tuchtrecht*'.

Paragraphs 5.5.2.1.-5.5.2.6. will consider instances of this sort of *tuchtrecht*, respectively internal self-regulation, sports' codes, self-regulation that has has withheld the legislator from introducing legislation, and instances of other codes of conduct and self-regulation in the absence of mandatory law. Paragraph 5.5.2.7. will discuss the role of non-

[706] For example Hof 's-Gravenhage 6 July 2004, *NJ* 2004, 483.

state actors, and paragraph 5.5.2.8. will turn to limitations on non-state actors' roles. Paragraph 5.5.2.9. will end with a conclusion.

5.5.2.1. Internally binding codes on the basis of articles of association

Organisations may impose rules internally, through rules ('*reglementen*'). Originally, the law did not stipulate these rules that were developed in practice.[707] Internal rules may stipulate various matters. However, articles of association may appoint relevant organs to develop rules.

5.5.2.2. Sports associations

The primary sports organisation in The Netherlands is the NOC*NSF. In its articles of association,[708] it has moreover stipulated that it is solely competent to nominate candidates for the Olympics, and it obliges its members to comply with the rules developed by the International Olympic Committee (IOC). However, these rules of NOC*NSF have not been systematically been integrated in the articles of association of its members, national associations for specific sports.[709] The degree to which members impose these rules and their rules on their members may vary. This may entail that the rules developed by the IOC are not necessarily binding on the basis of national sports associations' articles of association. Alternatively, rules imposed by the IOC may be enforced as associations provide their members with models for articles of associations, or on the basis of contracts.

5.5.2.3. The encouragement of self-regulation in a national and European context

The legislator [710] has approved of the Advertising Code for Alcoholic Beverages ('*Reclamecode voor alcoholhoudende dranken*', 'RvA'), established by stakeholders organised in the Foundation for the responsible use of alcohol ('*Stichting verantwoord alcoholgebruik*', STIVA).[711] The RvA is part of the Dutch Commercials Code ('*Nederlandse Reclame Code*', 'NRC') that is supervised by the Dutch Foundation for Commercials Code ('*Stichting Reclame Code*', 'SRC').[712] Article 3.8 Mediawet obliges commercial broadcasting channels to participate with the NRC or a similar code supervised by the SRC. Compliance with the RvA is also monitored by the Foundation for Prevention of Alcohol related damage ('*Stichting alcoholpreventie*', 'STAP')[713] that criticises the use of self-regulation in this area.[714] STAP participates in a European network, EUROCARE (Advocacy for the Prevention of

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[707] T.J. van der Ploeg, 'Reglementen bij verenigingen; een duik in troebel water', *WPNR* 5929 (1989).
[708] Available at http://www.nocnsf.nl/statuten.
[709] See fora n overview http://www.nocnsf.nl/cms/showpage.aspx?id=179&mid=99.
[710] Kamerstukken II, 2005-06, 29 894, 27 565, nr. 11, p. 3. STIVA has also published a report defending the effectiveness of the self-regulation: STIVA, *Zelfregulering tegen het licht*, 2007, available at http://stiva.nl/Documenten.
[711] Available at http://stiva.nl/Documenten.
[712] The Dutch Commercials Code ('*Nederlandse Reclame Code*') was formed in a cooperation between advertisers, advertising agencies and the media. Other codes of conduct approved by the SRC and part of the NRC are, the Code email business recipients, the Code telemarketing, the Code for the distribution of advertising leaflets without an address ('*Code verspreiding ongeadresseerd reclamedrukwerk*'). Codes not approved and supervised by the SRC are the Code Listbroking and Code streetmarketing, established by the Dutch Dialogue Marketing Association, and the DDMA privacy code, see http://www.ddma.nl/index.php?pag=4&sub=24. ,)
See further the website of the *Reclame Code Commissie*, http://www.reclamecode.nl/consument/default.asp?paginaID=1&hID=1,
[713] See http://www.alcoholpreventie.nl/info/?over.
[714] See for example STAP, *Alcoholreclame in Nederland: Zelf regelen of laten regelen?*, Aanbevelingsrapport 2008, available at http://www.alcoholpreventie.nl/bestand/Aanbevelingenrapport.pdf.

Alcohol Related Harm in Europe) that promotes the dealing with the production, distribution, trade and consumption of alcohol at a European level.[715]

While advertising in alcohol products is stipulated through self-regulation alone, the SRC supervises compliance with the NRC that generally prohibits misleading and comparative advertising. The establishment of the NRC has taken place within the framework provided by article 6:162 Civil Code, and after the implementation of Directive 2005/29 on misleading and unfair commercial practices, article 6: 193a Civil Code. The effectiveness of the SRC has been criticised as not being able to provide sufficient protection for consumers: its competence is limited and it has no possibility to enforce its decisions.[716]

The European Advertising Standards Alliance (EASA), in which the SCR participates, was established in 1992 to show that self-regulation in the advertising area was to be preferred over legislation.[717] Apparently, the EASA has failed to convince the EU on this point.[718] However, the adoption of legislation does not rule out self-regulation. Accordingly, the EASA, also a member of international organisations, continues to promote self-regulation, recommending codes of conducts developed at the international level. In particular, the ICC Code on advertising and marketing clearly overlaps with the Directive on misleading and comparative advertising, as also noted by the Commission in the drafting of the Directive.[719] The ICC code and the Directive converge at some points – for example when banning the offers not sufficiently anticipating consumer demand – but diverge at other points – thus, the ICC code does not take the well-informed, reasonably circumspect consumer as a starting point. Arguably, Directive 2006/114 that partially aims for maximum harmonisation, as well as Directive 2005/29 on unfair commercial practices that pursue maximum harmonisation do not stand in the way of these developments, considering that both Directive expressly refer to self-regulation through the development of codes of conduct.

5.5.2.4. Encouraging self-regulation

Self-regulation has been encouraged in various instances, to complement legislation. Accordingly, the Dutch Bankers' Association ('*Nederlandse Vereniging van Banken*', 'NVB'), has established several self-regulatory instruments for the interaction between banks and their clients which are binding on their members. These codes specifically aim to complement legislation, for example the privacy code of conduct ('*Gedragscode Verwerking Persoonsgegevens*'),[720] and the Chinese walls code of conduct.[721] The NVB is member of the European Banking Federation ('EBF') that has issued very generally formulated guiding principles.[722]

In insurance laws, codes on privacy ('*Gedragscode verwerking persoonsgegevens financiële instellingen*'),[723] have similarly been established, as well as the code of conduct on personal examinations ('*Gedragscode persoonlijk onderzoek*'). [724] More generally, self-regulation plays a prominent role because the legislator has explicitly chosen to refrain as much as possible from mandatory law, even though contracts between insurers and

[715] See for more information http://www.eurocare.org/about_us.
[716] Asser/Hartkamp 4-III (2006), nr. 244.
[717] http://www.easa-alliance.org/About-EASA/History/page.aspx/117 (accessed 22 October 2009)
[718] Most recently Directive 2006/114 concerning misleading and comparative advertising was adopted. Before that, legislation on advertising could be found in Directives 84/450/EC, as amended by Directive 1997/55/EC and Directive 2000/31/EC.
[719] COM (91) 147 final, p. 21.
[720] Available at http://www.nvb.nl/scrivo/asset.php?id=12355.
[721] Available at http://www.nvb.nl/scrivo/asset.php?id=11758.
[722] Available at http://www.ebf-fbe.eu/index.php?page=guiding-principles.
[723] Available at http://www.verbondvanverzekeraars.nl/UserFiles/File/download/GVPFI.pdf.
[724] Available at http://www.verbondvanverzekeraars.nl/UserFiles/File/download/Bijlage1C.pdf.

consumers have been stipulated in article 7: 925 et seq Civil Code. Accordingly, compliance with the insurers' code of conduct ('*Gedragscode verzekeraars*')[725] is a requirement for membership. However, this code provides ambiguous, general rules that generally do not go beyond consumer protection legislation in this area, and which may therefore be of little added value in the interpretation of articles 7:925 et seq BW. In contrast, the code of conduct of informed renewal and contract periods for indemnity insurances to individuals ('*Gedragscode geïnformeerde verlenging en contractstermijnen particuliere schadeverzekeringen*'),[726] is more precise. It has gone into effect on 1 January 2010 and will be evaluated in 3 years. The code of conduct on expertise on motor vehicles ('*Gedragsregels bij expertise motorrijtuigen*') has been negotiated and the BOVAG, FOCWA, NIVRE/NIAV.[727] Moreover, according to the HIV-code of conduct ('*HIV gedragscode*')[728] people with HIV may, under conditions, enter into life insurance contracts. According to the Netherlands HIV Association, the number of rejections for life insurance policies has decreased considerably since this advice.[729]

From January 2010, Adfiz, previously the Dutch Association representing independent financial and insurance agents and the Dutch Association for Insurance Agents which will oblige its members to sign a code on independent advice ('*Code onafhankelijk advies*').[730]

5.5.2.5. Codes as conditions for membership: consumer sales

The Dutch home shopping association, ('*Nederlandse Thuiswinkel Organisatie*')[731] provides its members with a certificate, the '*Thuiswinkel Waarborg*', and a code of conduct based on the European convention on cross-border mail order and distance selling.[732] Interestingly, the EMOTA aims to add to international, European and national regulation and thereby further the European internal market.[733] The Stichting Webshop Keurmerk[734] also provides its members with a trustmark for online shopping.

5.5.2.6. Codes as conditions for membership in the absence of mandatory law

Codes of conduct in the absence of sufficient legislation. This includes codes in the area of franchising and debt collection.

The European Franchise Federation (EFF) has established a European code of ethics for franchising.[735] It particularly requires its members, national organisations, to require that their members comply with its code. Accordingly, the Netherlands Franchise Association ('*Nederlandse franchise vereniging*', 'NVF') requires its members to comply with this code.[736]

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[725] Available at http://www.verzekeraars.nl/UserFiles/Image/Gedragscode_Verzekeraars_juni2011.pdf.
[726] Available at http://www.verbondvanverzekeraars.nl/UserFiles/File/download/gedragscode_verl_en_contr_termijn_part_schadeverz_09.pdf.
[727] Available at http://www.verbondvanverzekeraars.nl/Publicaties.aspx?publicatieid=31
[728] Available at http://www.verbondvanverzekeraars.nl/UserFiles/File/download/Bijlage1E.pdf.
[729] See http://www.hivnet.org/index.php?option=com_content&view=article&id=7987:hiv-als-verzekerbare-chronische-aandoening-erkend&catid=9:maatschappelijk-verzekering&Itemid=648.
[730] Available at http://www.denk.verzekeringstools.nl/downloads/adfiz/adfizcodevanonafhankelijkadvies.pdf.
[731] See http://www.thuiswinkel.org/consumenten/.
[732] Available at http://www.emota.eu/index.php?option=com_content&view=article&id=109&Itemid=91.
[733] As stated on the website of EMOTA: http://www.emota.eu/index.php?option=com_content&view=article&id=109&Itemid=91.
[734] See http://biedmeerwebwinkels.nl/Page309/Webshop-Keurmerk.html.
[735] The text of this code is available at http://www.eff-franchise.com/spip.php?rubrique13.
[736] See http://www.nfv.nl/franchisegevers-vragen/#4.

However, the code contains various ambiguous terms and at points does not seek to go beyond what is legally required.

Additionally, self-regulation not established by stakeholders are the Unidroit Model Franchise Disclosure Law and the ICC Model for International Franchising Contract. However, the *Hoge Raad*[737] has not used soft law on franchising for interpreting the duties of a franchiser to provide information to the franchisee. In contrast, the district court Zutphen has since referred to the code of ethics.[738]

Another example of self-regulation in the absence of mandatory law is self-regulation in the area of debt collection. The Dutch Association for Collecting Businesses ('*Nederlandse Vereniging voor Incasso Ondernemingen*', hereafter: 'NVI')[739] has claimed a lack of specific regulation in the area of debt collection[740] and provided a code of conduct that its members must comply with and a corresponding quality mark.[741] At a European level, the NVI participates in the Federation of European National Collection Associations ('FENCA') that, apart from providing basic guidelines for contracts to its members, has established an overarching code of conduct for its members, against the background of members' existing codes of conducts.[742] The FENCA requires its members to develop a code of conduct and the assurance that it is complied with.

5.5.2.7. The role of non-state actors

Non-state actors play a prominent role in the development of self-regulation on the basis of articles of association.

Notably, even though article 8 Gw recognises the right to association, the developments of rules through articles of association has generally not been considered in this light. Nevertheless, state actors have left actors with considerable room to develop self-regulation and in the case of advertising for alcoholic products, insurance and banking, even abstained from legislation. However, where legislation has been established, this has not stood in the way of self-regulation.

Accordingly, the law assumes that rules established in accordance with the articles of association are internally binding and decisions contrary to rules are avoidable under article 2:15 par. 1 sub c BW.

The compliance with codes of conduct differs across legal areas, but generally, compliance is also not a complete failure. Thus, organisations manage to affect the behaviour of members in accordance with their codes. This does not mean that self-regulation generally is an immediate success – this also depends on the question whether compliance with codes is compulsory or optional, whether codes provide sufficiently clear rules, whether they provide clear sanctions on the breach of those rules. Various codes do

[737] HR 25 January 2002, *NJ* 2003, 31.
[738] Rb. Zutphen 27 August 2008, *LJN* BE9241. See, rather optimistically, and for further case law, A.J.J. van der Heiden, 'De invloed van door een franchisegever verstrekte prognoses voorafgaand aan het sluiten van een franchiseovereenkomst', *Contracteren* 2002, p. 93.
[739] See http://www.nvio.nl/de-organisatie. The NVI represents its members in negotiations with the government and consumer organisations and facilitates exchange of information among its members.
[740] While claiming a lacuna in legislation on debt collection, the NVI has reacted very critically to legislative proposals ('Wetsvoorstel incassokosten') as too expensive and hindering the settlement out of court: NVI, *Belangen in balans*, Position paper 5 November 2009, available at: http://klanten.e-mark.nl/nvio/Position%20paper%20NVI%209%20november%202009.pdf.
[741] Available at http://www.nvio.nl/files/Gedragscode2.pdf.
[742] See http://www.fenca.org/uploads/FENCA%20Code%20of%20Conduct.pdf. Additionally, FENCA protects the interests of national member organisations and lobbies for European legislation. It provides basic rules and guidelines for contracts to its members.

not oblige members to comply with codes of conduct – although they encourage it – or they provide ambiguous rules without clear sanctions, or they do not supervise compliance.

Moreover, the influence of codes can extend beyond organisations even if they are not directly binding.

For example, professional guidelines may be relevant for determining whether lawyers have behaved professionally.[743] Similarly, third parties may for example complain on the lack of compliance with guidelines for experts as developed by the *Verbond van Verzekeraars*.[744]

Thus, state actors have left non-state actors considerable freedom in the development of voluntary disciplinary law.

5.5.2.8. Limitations on the role of non-state actors

The membership of organisations has been characterised as a relation that differs from a contractual relationship.[745] Notwithstanding the special nature of membership, voluntary disciplinary law has generally not been a separately distinguished sort of self-regulation, and objections of *Fremdbestimmung* have generally not arisen. Accordingly, there is very little attention to the development of rules within organisations. Consequently, the adoption and amendment of rules is not stipulated in the law.[746] Similarly, principal objections to the dynamic referral to the IOC in the articles of association of the NOC*NSF have not arisen.

5.5.2.9. Conclusion on '*tuchtrecht*'

A large variety of codes has been developed by associations. The binding force of these codes depends on the vagueness of codes, the sanctions imposed on breaches of the codes and the enforcement of the codes against members. In some cases, codes may also serve to determine, for example, professional behaviour. The legislator has exercised restraint in replacing self-regulation with legislation, which has left non-state actors with much freedom to develop codes as they choose.

Codes on the basis of articles of association are not distinguished as a separate form of self-regulation and control mechanisms have accordingly not been developed. Thus, the roles of non-state actors have not generally been subjected to restrictions.

5.5.3. One sided declarations

Some forms of self-regulation are neither based on contracts nor based on articles of association. These codes may be the result of extensive negotiations, which are not especially one-sided. However, collectively negotiated self-regulation characteristically results in a code and one-sided recommendations or declarations of compliance.

Paragraphs 5.5.3.1-5.5.3.5. will consider instances of self-regulation. Respectively, codes in the area of consumer sales and energy supply, initiatives for in the field of corporate social responsibility, the recommendations of the *Verbond van Verzekeraars* and basic payment services will be considered. Paragraph 5.5.3.6. will discuss the role of non-state

[743] Rb. 's-Gravenhage 10 July 2007, *NJF* 2007, 384, also,Hof Amsterdam 24 May 2011, *LJN* BV2685, which has given rise to debate, see especially the theme issue of *WPNR* (6954) .
[744] A.Ch.H. Franken, Experts en hun gedragsregels', *AV & S* 2004, 4.
[745] Asser/Maeijer/Van Solinge/Nieuwe Weme (2005) nr 44.
[746] Asser/Maeijer/Van Solinge/Nieuwe Weme (2005) nr 258.

actors and paragraph 5.5.3.7. will turn limitations to the roles of these actors. Paragraph 5.5.3.8. will end with a conclusion.

5.5.3.1. Binding declarations: consumer sales

Various initiatives for self-regulation have been developed in the area of consumer sales, especially online selling, both at the national and European level:

- The Electronic Commerce Platform in the Netherlands ('ECP-EPN') has developed the model code of conduct on conducting business electronically.[747] In turn, this code has been used as an example at the international level.[748]

This code overlaps with self-regulation established by Thuiswinkel.org and Stichting Webshop Keurmerk. The model code provided by the ECP-EPN is a model code that clearly aims to provide members with tools to developed consistent self-regulation.[749]

- In the *eConfidence* project,[750] BEUC and UNICE, under supervision of the European Commission, established the European Trustmark Requirements for e-commerce between businesses and consumers. The scheme set down standards for European trust marks in the EU with regard to several issues, including pre-contractual information, language, payment and security. However, it is unclear whether these requirements have been implemented.

- In the digital agenda for Europe, the Commission[751] has announced that it will develop a Code of EU Online Rights and organise a European-wide platform on trust marks for stakeholders.

5.5.3.2. Binding declarations: contracts for the supply of energy

Because public utility companies use uniform STC's, collectively negotiated within the framework of the SER, the legislator has abstained from providing specific rules on contracts between public utility companies and consumers.[752] Apart from these STC's, EnergieNed, representing public utility companies, in cooperation with consumer organisations, has also established a code of conduct for consumers and providers of electricity, who can enter into a contract with EnergieNed that they will apply the code.[753] If businesses apply the code, they need to develop protocols indicating how they ensure compliance with the code. Loos, has suggested that the Civil Code should contain provisions on the contracts between consumers and public utility companies.[754]

Several suppliers[755] have committed themselves to the code and presented it expressly to consumers. However, problems with compliance have arisen.[756]

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[747] Available at http://www.ecp.nl/model-gedragscode-voor-elektronisch-zakendoen.
[748] See in particular Recommendation 32 of United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFAC), March 2000, that claims that the OECD, ICC and the European Commission have also shown interest in this code.
[749] For exampole by Nieuwsbank, see http://www.nieuwsbank.nl/overnieuwsbank/gedragscode.htm.
[750] Available at http://legacy.quatro-project.org/files/file/unice-beuc/eConfidence.pdf.
[751] COM (2010) 245 final/2, p. 13.
[752] PG Boek 7 p. 33.
[753] See http://www.nma.nl/regulering/energie/elektriciteit/regelgeving/vrijwillige_afspraken/default.aspx.
[754] M. Loos, *De energieleveringsovereenkomst*, Kluwer: Tilburg 1998, p. 247-280.
[755] See for an overview http://www.energie-nederland.nl/consument/. These suppliers include Nuon (http://www.nuon.nl/privacy-en-gebruiksvoorwaarden.jsp#Gedragscode), Essent (http://www.essent.nl/content/particulier/voorwaarden/algemene_voorwaarden/index.html), the NEM

5.5.3.3. Suggesting reinforced self-regulation: social corporate responsibility

Businesses may provide a statement of "corporate social responsibility", that they will not violate human rights or the environment, as is for example the case for Dutch multinationals such as Shell. This does however not necessarily mean that Shell can be held liable for environmental damage resulting from spills, which may not only be complicated under private international law,[757] but which also requires, for example, ensuring the responsibility of Shell for damages arising, for example, from spills. The decisions[758] on claims against Shell have not referred to Shell's general statements, but evaluated the claim, based on non-contractual liability, under Nigerian law.

To increase corporate social responsibility, the legislator has proposed introducing a duty of transparency on Dutch multinationals in 2001. The proposal[759] expressly rejects developing standards of social corporate responsibility in national law, as this may petrify the development of international rules. Also, curiously, the proposal considers that a legal standard may prevent that companies internalize this standard, which the legislator considers as the main incentive behind the dynamic development of standards. Accordingly, companies may decide for themselves according to which guidelines they measure their compliance to corporate social responsibility. The question however arises whether this will lead to guidelines that are more specific than a necessarily ambiguous legal standard. The proposal aims to add a paragraph to article 3:291 BW that obliges companies to include, in their annual accounts, their compliance with social corporate responsibility. The proposal goes on to note that the correctness of the information provided by companies depends on the sense of responsibility of companies themselves, but adds that additional control by stakeholders, especially internationally operating NGO's, is desirable, while eventually, international guidelines may provide adequate staring points for evaluating whether companies' policies are in accordance with social corporate responsibility. However, despite the lenient approach to standards, the proposed article does make clear on what topics companies have to at least provide a report. Currently, however, rather than passing the proposal, the Dutch government has supported and developed networks to support compliance with these guidelines.[760]

The European Commission [761] has announced a legislative proposal obliging companies to provide information. Article 1.14 Directive 2003/51 currently already stipulates that companies falling under this Directive must include non-financial aspects in their yearly accounts, which has been implemented in article 2:391 par. 1 BW. The preamble makes clear that ember states can waive this obligation. At a European level, international rules have likewise served as a starting point.[762]

5.5.3.4. Codes of conduct on the basis of recommendations

(http://www.nle.nl/Over_ons/Over_NLE/Gedragscode), Eneco (http://thuis.eneco.nl/klantenservice/informatie/voorwaarden/), Greenchoice (http://www.greenchoice.nl/thuis/klant-worden/voorwaarden), Energie:Direct (http://www.energiedirect.nl/algemenevoorwaarden).

[756] See the response of the Minister for Economic Affairs to questions of Parliament on 29 July 2009.

[757] Rb. 's-Gravenhage 30 January 2013, *LJN* BY9845, Rb. 's-Gravenhage 30 January 2013, *LJN* BY9850, Rb. 's-Gravenhage 30 January 2013, *LJN* BY9854.

[758] Rb. 's-Gravenhage 14 September 2011, *LJN* BU3538.

[759] *Kamerstukken II*, 2000-2001, 27905, nr. 3.

[760] See further http://www.rijksoverheid.nl/onderwerpen/maatschappelijk-verantwoord-ondernemen/mvo-internationaal. .

[761] COM (2011) 681 final, p. 11-12.

[762] COM (2011) 681 final.

Organisations may advice their members to comply with codes of conduct. Additionally, members and cooperative organisations of the *Verbond van Verzekeraars* may recognise the code of conduct for expert organisations ('*Gedragscode expertiseorganisaties*'),[763] as well as the protocol on fraud ('*Fraudeprotocol 1998*').[764] A recent, and well-known example of non-binding codes of conduct adopted in the area of insurance contract law was the development of the the *Verbond voor Verzekeraars* is the Insurers' Institute on personal injury (PIV) [765] of the code of conduct on the treatment of personal injuries ('*Gedragscode behandeling letselschade*', 'GBL').[766]

Some of the codes of conduct used by insurers are subject to criticism and support for these codes is doubted. An example of a problematic area is the handling of personal injury claims that was severely criticised in 2003.[767] In addition, the 2003 report concluded that the *Gedragscode verzekeraars* was often ignored by insurers, especially in cases with large financial stakes.

The GBL was developed in response to the report, but this code is not supported by the Dutch association for personal injury lawyers ('*Vereniging van letselschadeadvocaten*', 'LSA'). The LSA[768] has pointed out that the professional code of conduct for lawyers ('*Gedragsregels 1992*') is not compatible with this that would oblige lawyers to aim for settlement, while that may not be in their clients' best interests, while lawyers can also not oblige clients to comply with the code. Moreover, the LSA remarks that a duty to settle out of court may violate article 6 ECHR, and that the GBL differs from the previous code of conduct on the handling of personal injury in traffic ('*Gedragscode bij de behandeling van personenschade in het verkeer*').

Since its establishment, very little has happened to develop the GBL.[769] In his 2011 report, the Ombudsman concluded that the code has hardly facilitated the handling of disputes of personal injury, and most victims were unfamiliar with the code,[770] despite the wide participation of interest groups in the drafting of the code.

5.5.3.5. Primary payment services: binding declarations?

In cooperation with the Ministry of Finance, debt counselling organisations, and the Salvation Army, the NVB has agreed on a covenant on basic payment services ('*Convenant inzake*

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[763] Available at http://www.verbondvanverzekeraars.nl/UserFiles/File/download/gedragscodeexpertiseorganisaties.pdf.
[764] See for more information http://www.verbondvanverzekeraars.nl/page/render.aspx?id=607.
[765] See for more information http://www.stichtingpiv.nl/smartsite.dws?id=279445.
[766] Available at http://www.deletselschaderaad.nl/index.cfm?page=Richtlijnen. The compliance of this code is supervised by the Council for Personal Injuries ('*de Letselschade Raad*', previously the *Nationaal Platform Personenschade*), representing stakeholders (insurers, experts, victims' representatives). There are guidelines dealing with specific situations, available at the website of the *Letselschade Raad*, http://www.deletselschaderaad.nl/index.cfm?page=Richtlijnen.
[767] Stichting Ombudsman, 'Onderhandelen met het mes op tafel, of een zoektocht naar redelijkheid', November 2003, summary available at http://www.deombudsman.nl/sites/default/files/docs/publicaties/Rapport_Onderhandelen_met_het_mes_op_tafel.pdf, Similarly W.C.T. Weterings, *Efficiëntere en effectievere afwikkeling van letselschadeclaims*, BJU: The Hague 2004, found serious problems in the handling of personal injkury claims and made recommendations to facilitate negotiations between parties.
[768] LSA, Letter regarding decision of LSA 30 June 2005, available (in Dutch) at https://normering.rechten.uvt.nl/upload/111020051134796199977397.pdf.
[769] D.J. ten Boom, V.P. Reute, 'Gedragscode behandeling letselschade – commerciële of maatschappelijke business case?', available at http://www.stichtingpiv.nl/smartsite.dws?ch=TER&id=760550. Very critical on the Gedragscode behandeling letselschade (and on codes of conduct, certification and other self-regulation in general) from a bureau (non-lawyers) handling proceedings for personal injury victims (on a no cure no pay basis) G. Lijffijt, 'Pals Groep trekt eigen plan', *Assurantie Magazine* 6 March 2009, available at http://www.stichtingpiv.nl/smartsite.dws?ch=TER&id=759979. The compliance of the Code was severely criticised in an episode of the TV-program 'Radar' on 2 November 2009.
[770] Stichting De Ombudsman, *De gedragscode Behandeling Letselschade: Een goed bewaard geheim?*, February 2011, at http://www.deombudsman.nl/sites/default/files/docs/publicaties/Stichting_De_Ombudsman_Rapport_Verbetering_afhandeling_letselschade.pdf.

pakket primaire betaaldiensten').[771] The convenant aims to increase the access to basic payment accounts under strict conditions. Accordingly, a website has been established that outlines these conditions.[772]

According to the 2004 evaluation,[773] the access to basic payment services had been improved, although some problems, for example a lack of accessibility, were signalled. Notably, the legislator has adopted a proposal obliging banks to offer a basic payment account to all consumers. According to the draft,[774] this initiative, largely based on the convenant, is necessary as not all banks – especially small banks – comply with the convenant.

5.5.3.6. The role of non-state actors

The Dutch legislator has adopted considerable restraint that has withheld it form intervening in areas where private actors, or groups of stakeholders, have established self-regulation. If declarations of compliance may be binding, drafters of codes may exert substantial influence over the behaviour of other private parties.

The question whether codes can be enforced by consumers depends on the quesiton whether declarations of compliance are juridical acts that consumers can justifiably rely on on the basis of articles 3:33 and 35 BW. The main question that should be answered is whether declarations are meant to have legal effect. If not, the declaration is merely a factual act, not a juridical act. The answer whether a declaration is meant to have legal effect depends on several circumstances. Nieuwenhuis[775] rightly finds that societal interests may be an argument against the binding force of one-sided promises, for example because it may inhibit parties from making promises, because there is no reciprocity, or because it concerns promises – for example promises concerning marriage – that should not be enforceable. Various other circumstances may be relevant as well. Particularly, the vagueness of a promise a lack of further sanctions or publicity indicate that a declaration is not intended to have legal effect. Especially if codes do not impose sanctions on breaching the rules, the question whether a consumer, as a third party, has a clear interest that is financially measurable, can be relevant. Also, self-regulation based on an organisation's articles of association may be directed internally, or externally, which may be the case if the simultaneous use of self-regulation on the basis of articles of association as well as one-sided declarations makes clear that overlapping codes in for example the area of consumer sales may address members as well as consumers.

Binding effects for this reason can be defended in the following cases:

1. Accordingly, the code of conduct developed by Thuiswinkel.org aims to adopt 'consumer-friendly principles', as adequate consumer protection is recognised as essential for the interests of distance sellers across Europe. The code expressly aims to increase consumers' confidence, and a mere declaration that lacks binding force may not suffice. Also, the code is easily accessible online and provides sufficiently precise rules. It follows that businesses complying with this code seek to increase confidence, by binding themselves to standards, which may have legal effect.

[771] Available at http://www.nvb.nl/scrivo/asset.php?id=121608, see also the executive instruction ('*Uitvoeringsinstructie*') for this covenant, available at http://www.nvb.nl/scrivo/asset.php?id=121609.
[772] See http://www.basisbankrekening.nl/index.php?p=503067.
[773] Available at http://www.nvb.nl/pers_persberichten/rapportage-basis-bankdiensten.pdf.
[774] *Kamerstukken II*, 2010-2011, 32291, nr. 30.
[775] Comp. H.J. Nieuwenhuis, 'Promises, promises', *NJB* 2001-37.

2. The code on the supply of energy specifically aims to increase consumers' confidence, and it provides sufficiently specific rules.

In other cases, the binding effect of declarations of compliance is less clear:

1. Insurance companies frequently do not communicate to victims that they comply with the code on personal injury claims,[776] and in disputes, the code is generally not referred to. How can a declaration constitute a juridical act if it is – apparently – not aimed at the victims who should be the main beneficiaries of the code? However, the code is publicly accessible and provides sufficiently specific rules. Yet the declaration, although aimed at the *Letselschaderaad*, is arguably not solely internally directed, and as the Ombudsman rightly recognises, a code of conduct should not leave participants the option to simply ignore the code. Instead, the drafters of the code expressly aimed to facilitate disputes in this area, which however raises the question whrether drafters can be bound to *settle* disputes.

2. The declarations of banks to provide basic payment accounts make clear that banks who participate consider this as an obligation, and it is possible that future consumers have accordingly relied on this. However, the declaration as such does not constitute a binding offer; it is not precise enough, and subject to conditions. It may moreover be doubted if banks can be obliged to enter into contracts with consumers who superficially meet criteria established within the convenant but who, for example, have outstanding debts that they cannot repay, who provide incorrect information, or who have been convicted for forgery or fraud.

Declarations of compliance may moreover also be binding in the following cases:

1. If parties have relied on the declaration of compliance, in accordance with article 3:35 BW.[777]

Accordingly, consumers may justifiably rely on the code of Thuiswinkel.org and the accompanying, well-known trustmark. Similarly, consumers may rely on the declarations of energy-suppliers.

2. If people have relied on businesses' declaration of compliance, non-compliance may constitute an unfair commercial practice.

Accordingly, breach of the code on the supply of energy breaches consumer protection law, which may prompt administrative fines.[778] Possibly, breach of the codes of Thuiswinkel.org may also constitute unfair commercial practices.

3. Codes may play a role in the assessment of businesses' behaviour.

Accordingly, the district court Zutphen[779] imposed additional damages for the way the insurer had handled the dispute on physical injury, contrary to the code. Likewise, the district court Leeuwarden[780]

[776] Some companies however do refer to the code, see https://www.centraalbeheer.nl/SiteCollectionDocuments/Prive%20%28BDS%29/Productwijzer%20Rechtsbijstand%20in%20het%20verkeer_2011.pdf,
[777] Hof Amsterdam 22 July 1999, *NJ* 2001, 286.
[778] For example the 2011 fine of Greenchoice for misleading door to door selling (http://www.consumentenautoriteit.nl/nieuws/2011/consumentenautoriteit-beboet-greenchoice-misleidende-colportage), the 2010 fine for the Nederlandse Energie Maatschappij for misleading distance selling (http://www.consumentenautoriteit.nl/besluiten/sanctiebesluiten/besluit-zaak-nederlandse-energie-maatschappij),

took a code of conduct on text message services, recognised by the claimant, as a starting point for determining whether the consumer was liable.

Thus, non-state actors may exert substantial influence on businesses who seek to comply with the codes, but this depends on the willingness of these actors to formulate and publish sufficiently clearly worded codes, and compliance with these codes depends on the willingness of businesses to state their compliance and behave accordingly. State actors have however shown themselves willing to reinforce these statements.

5.5.3.7. Limitations on the role of non-state actors?

The Dutch legislator has shown restraint even though problems with compliance with widely supported self-regulation have arisen. Similarly, control mechanisms to limit the role of actors have generally not been developed. However, problems with enforcement have prompted the European legislator to establish trules on corporate social responsibility, while the Dutch legislator has considered intervening to provide vulnerable consumers with basic payment accounts. It is not clear why the legislator has exercised more restraint in other areas where problems with compliance have also arisen, especially with regard to personal injury claims, social corporate responsibility and codes on the supply of energy to consumers. The current approach to corporate social responsibility still emphasises the expectation that Dutch companies will act in accordance with international guidelines. Although compliance with these guidelines is a requirement for receiving subsidies, multinationals are not obliged to report their compliance with these standards, which may not always be in companies' immediate interest.[781]

Other initiaves indicate that the legislator does seek to prevent problems that may arise from non-state actors' initiatives, without however limiting non-state actors' roles. Accordingly, because the increasing use of trust marks may increase chances of inaccessibility, the Ministry of Economics has provided an overview of reliable trust marks.[782]

Interestingly, however, non-state actors have also developed initiatives reminiscent of German control mechanisms that are aimed at increasing the quality of alternative regulation. Accordingly, in the drafting of the insurers' code on personal injury claims, relevant actors widely participated, and third parties had opportunities to influence the code. This process did not lead to compliance with the code, nor have policy holders and consumers become more aware of relevant self-regulation.

Likewise, in the area of social corporate responsibility, various stakeholders with considerable expertise in collective negotiations have been involved in various platforms that promote social corporate responsibility.[783] Consequently, implementing social corporate responsibility is not wholly left to multinationals, but more independent organisations also play a role.

The European Commission has exercised less restraint than the Dutch legislator. Accordingly, it has suggested the EU code of online consumer rights that regrettably overlooks relevant Dutch initiatives. Even though the Commission does not, as such, reject alternative regulation or consider the possibility that private actors pursue private rather than

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[779] Rb. Zutphen 7 November 2007, *NJF* 2007, 545. Comp. also J.B.M. Vranken in his note after *NJ* 2008, 241.
[780] Rb. Leeuwarden 11 February 2009, *LJN* BH2709.
[781] Letter of secretary of state of economic affairs 29 March 2012.
[782] At http://www.consuwijzer.nl/keurmerken.
[783] See for example http://www.idhsustainabletrade.com/organization. Comp. also the report of the SER, *Ontwikkeling door duurzaam ondernemen*, 2011, available at http://www.ser.nl/~/media/DB_Adviezen/2010_2019/2011/b30143.ashx.

public interests, the top-down approach of the European Commission has also led to a more decisive approach towards the development of social corporate responsibility that however also leaves room for the role of non-state actors and international actors.

5.5.3.8. Conclusion on one-sided declarations

Because of the restraint of the Dutch legislator, both in intervening in areas where self-regulation has been established and in the development of control mechanisms, non-state actors may play a substantial role. These non-state actors may primarily bind themselves to behave in accordance with self-regulation towards consumers, which has been reinforced by the courts. Interestingly, non-state actors have developed mechanisms that should improve the quality of self-regulation, rather than limiting the role of non-state actors. However, these mechanisms do not appear particularly successful.

The lack of success of some forms of self-regulation also highlights potential weaknesses of self-regulation, especially insufficient accessibility, which has become apparent even if self-regulation has been developed in a transparent, inclusive process, and problems of enforcement.

5.5.4. Reconsidering the distinction between *tuchtrecht* and one-sided declarations

This paragraph has made a distinction between contractual self-regulation, self-regulation based on '*tuchtrecht*', and one-sided declarations. The distinction between these forms of self-regulation is not usually made, and the division in this chapter has hopefully made clear for what reasons: the distinction is not a sharp one, as various forms of self-regulation may overlap.

Furthermore, the distinction between self-regulation based on articles of associations and 'other' self-regulation does not pay attention to the role of surrounding legislation and the amount of initiatives of self-regulation, which may well affect the effectiveness and scope of self-regulation.

Self-regulation that has replaced specific legislation is visible in the advertising on alcoholic products, as well as insurance contracts, where the legislator – and not the judiciary – continues to adopt restraint despite complaints that insurers do not comply with the code. Other self-regulation clearly complements legislation, in the area of advertising. The absence of specific legislation, however, does not necessarily mean that self-regulation will become prominent, as becomes visible in the area of debt collection.

Also, importantly, the differences between self-regulation established on the basis of articles of association and one-sided declarations does not entail a difference in the enforcement of self-regulation. In some instances, self-regulation developed by Thuiswinkel.org and Stichting Webshop Keurmerk are clearly successful, which certainly should not be seen apart from the careful scrutiny of potential members. Also, if self-regulation has been developed by associations with a large number of members, it is more likely that actors have recognised self-regulation. Furthermore, the enforcement of organisations of these rules is important for the influence of codes. A lack of enforcement in other areas – for example with regard to the GBL – may be a reason to reconsider leaving compliance with this code to organisations that also represent the interests of a particular industry.

The binding effect of one-sided declarations can also be traced to the possibility for consumers to enforce compliance, either because they constitute a juridical act, or because consumers have justifiably relied on declarations, or because non-compliance constitutes an unfair commercial practice.

Notably, the possibility to enforce these declarations has not visibly inhibited initiatives in The Netherlands, as has been argued in the German legal order.

As the distinction between voluntary disciplinary law and one-sided declarations as such do not entail a difference in the binding force of codes, state actors have not considered problems of *Fremdbestimmung* in either form of self-regulation.

The involvement of the European Commission, if it presents a code in the area of consumer sales, is more likely to be criticised than the role of non-state actors.

5.5.5. Conclusion on non-state actors

A considerable amount of self-regulation has developed, especially at the national level, and non-state actors may exercise substantial influence. The Dutch legislator has shown restraint in intervening in unsuccessful self-regulation, but it is difficult to deduce a consistent approach to the role of non-state actors.

Perhaps, the restraint of the legislator is in accordance with more general restraint exercised by legislatures that have established codifications – but this is not in accordance with recent changes in the BW.[784] Alternatively, an active approach of the courts – which has however not consistently been established – might have justified more restraint. A more probable cause is the lack of political support to intervene in newly established insurance law and possibly, also, a more general lack of support for legislative intervention. It may however be doubted whether the restraint of the legislator in the area of insurances is in conformity with the restraint adopted by the legislator in areas where weaker parties have not been involved.

Arguably, the development of a normative framework should contribute to a more predictable and stable approach towards self-regulation, and it would form a consistent starting point for the legislator to intervene in areas where the self-regulation has failed.

The European legislator adopts less restraint, despite the development of bottom-up initiatives at the European level.

Both under Dutch law and European law, non-state actors have a prominent role, but they have more liberty to establish self-regulation independently at the national level. State actors initiatives may both strengthen and weaken the position of non-state actors:

1. The weaknesses of self-regulation make self-regulation an unattractive option for implementing Directives, thus diminishing the role of non-state actors.

The Dutch legislator found the level of self-regulation and supervision in the area of consumer credit high enough that, apart from the general provisions, specific legislation in the Civil Code on contracts between banks and consumers were not considered necessary,[785] which has changed since the Directive on consumer credit has been revised.

2. The room left for non-state actors' initiatives in some new instruments is not clear.

[784] For example the amendments of articles 6:236 and 237 BW, see further par. 11.3.3.5.
[785] W. van Boom, 'Algemene en bijzondere regelingen in het vermogensrecht', *RM Themis* 2003-6, p. 298. Comp. Previously critically E.H. Hondius, 'De bankovereenjkomst: Niets bijzonders? Bank en consument in het Nieuwe BW', in: A.G. Lubbers (ed.), *Om wille van de consument*, Tjeenk Willink: Zwolle 1990, p. 67-81.

Self-regulation in the field of consumer sales is much less likely to be adopted for the implementation of a future revised Directive – which would moreover be complicated considering the suggestion for maximum harmonisation for a future Directive. It is also unclear what role self-regulation will play if parties choose to apply a future optional instrument to their contracts.[786]

Simultaneously, interdependence between state actors and non-state actors has become visible:

1. State actors promoting particular policy aims through self-regulation have to take into account successful self-regulation.

The success of self-regulation encouraged at the European level may, among other things, depend on already existing successful initiatives, for example in the case of consumer sales, where the eConfidence project has apparently not been successful. This should be taken into account in the development of new initiatives, in particular the EU Code of online consumer rights. The absence of self-regulation at the national level will however not necessarily increase the chance that self-regulation at the European level is successful, as becomes clear in the area of franchising.

2. The initiatives of non-state actors may promote the aims of state actors.

Thus, the development of self-regulation in the area of consumer sales as well as advertising also emphasises the internal market, which may strengthen corresponding initiatives from Euroean state actors.

Interdependence has also become visible between state actors:

1. If national state actors do not take into account sets of self-regulation, this may undermine the encouragement of these sets of self-regulation at the European level.

The Hoge Raad's decision to not take into account soft law and self-regulation on franchising may withhold other courts from referring to the code,[787] perhaps with some exceptions.

2. Initiatives from actors at the European level may undermine the initiatives of national actors.

Thus, the development of European trustmarks may make it more difficult to maintain an adequate overview of reliable trustmarks. Moreover, the European Commission may also attempt to provide overviews of trustmarks at the European level, although consumers are more likely to be familiar with national initiatives.

The interdependence between both state and non-state actors underlines the need for adequate interaction between actors. If actors interact with one another, they may strengthen rather than undermine one another's initiatives.

5.6. Conclusion

[786] V. Mak, 'Volgens lokaal gebruik…', *NJB* 2013, p. 4 has argued for more accessibility of local codes of conduct and business practices, coordinated at the European level.
[787] For example Ktr. Roermond 11 January 2012, *LJN* BV1313.

This chapter has asked what role actors play in the development of private law in the Dutch legal order.

Paragraph 5.6.1. describes what role actors play under Dutch law and paragraph 5.6.2. will outline what role actors play under European law, as also became apparent from the previous chapter. Paragraph 5.6.3. will compare the roles of actors under Dutch and European law, asking whether a framework could and should be developed. Paragraph 5.6.4. will consider interdependence and the changing role of actors.

5.6.1. The role of actors under Dutch law

Dutch state actors play a central role in the development of private law. International actors may establish binding norms that can set aside national law and European law sets aside national law on the basis of European law.

State actors have however also cooperated with non-state actors and allowed a substantial role for non-state actors in the development of self-regulation. The restraint of the Dutch legislator should not be sought in possible constitutional rights underlying the development of self-regulation, as this is generally not the case, with the exception of the development of CAO's. However, this has not withheld Dutch state actors from taking a purposeful approach to the development of CAO's.

State actors have frequently reinforced contractual self-regulation.Problems with enforcement are considered important problems and a solution to unsuccessful self-regulation may well be to reinforce it. Dutch state actors generally place few restraints on the roles of actors. However, the Dutch legislator has recognised potential difficulties between parties in unequal bargaining positions, and develope control mechanisms in the form of controlled collective negotiations, mandatory law and judicial evaluation. In some cases, control mechanisms take the form of more self-regulation or a prominent role for stakeholders with an interest in enforcing codes of conduct.

5.6.2. The role of actors under European law

State actors have played a central role in the development of the private law *acquis*, which however also leaves competences to national actors. The allocation of competences is in accordance with the TFEU. The role of actors under the TFEU is not clearly delineated and may be subject to change.

Non-state actors may also play a prominent role in the development of alternative regulation, and in the development of legislation. The role of non-state actors is supervsed by the European Commission that carefully encourages alternative regulation that might strengthen European policy aims. Apart from this supervision, and the involvement of the European Parliament in various forms of alternative regulation, few control mechanisms have been established.

5.6.3. Differences between the Dutch and European view?

The role of actors under Dutch law and European law shows a number of convergences:

1) The role of European actors

Both Dutch and European actors consider that the direct effect and the priority of European law is based on European law rather than the Gw. Consequently, the reallocation of competences to the

national level is determined by the TFEU and the CJEU is recognised as the competent court to interpret European law, including actors' competence.

2) The role of non-state actors

The development of alternative regulation is generally not considered as the exercise of constitutional rights. Nevertheless, non-state actors are left considerable room, especially at the national level, to develop alternative regulation. Constitutional objections have not arisen and will also not arise if rules previously developed by non-state actors are instead developed by state actors.

However, differences in the roles of actors under Dutch and European law are also visible.

1) The role of international actors

Whereas internation law direct effect, this is not the case for European law. However, as long as international law does not interfere with European law, no conflicts need arise. If the European legislator harmonises law previously harmonised through treaties, the European background of that rule will likely precede the international background, unless European measures allow that treaties precede European law.

2) The restraint of the Dutch legislator

In the absence of a Dutch equivalent of the *Untermaßverbot*, the Dutch legislator has shown restraint in intervening in alternative regulation, including instaces where compliance with self-regulation is problematic.

3) The development of control mechanisms

While both actors at the national and the European level have recognised the need to exercise control over alternative regulation, the emphasis at the European level is on the increased involvement of state actors in the development of European law.

Dutch actors have adopted a more critical approach and developed more control mechanisms, especially in cases where parties in collective negtiations do not have an equal bargaining position. Thus, collective bargaining takes place in the framework of the SER, and the representativeness and inclusiveness of collective negotiations has also been evaluated. Some of these mechanisms, however, leave a considerable amount of discretion to the judge or Minister. Interestingly, there have been suggestions to improve these mechanisms.

Frequently, also, control mechanisms have been developed to improve the quality of alternative regulation. In some cases, the lack of enforceability is seen as the main problem, whcih has led to the reinforcement of alternative regulation. Interestingly, control mechanisms may also entail more self-regulation.

5.6.4. The role of actors in a multilevel legal order

In the light of these differences, the question arises under which framework the role of actors is to be determined. As neither the Dutch or the European framework has been particularly well-developed, the question arises whether Dutch law should determine the role of actors, especially as it has recognised the precedence of European law and has no principal objections to extending or limiting the role of actors.

However, European law takes a fragmented approach and the involvement of private actors in the development of alternative regulation may udnermine the quality of private law. Moreover, concerns that questions of representativeness and inclusiveness are disregarded have already arisen, and these questions could and should be addressed more convincingly

and consistently at the national and the European level. Therefore, a framework should be developed at the national level to assess the roles of actors.

The argument for a framework however draws attention to the interdependence and the need for interaction between actors, while a framework should also take into account that the role of actors should not be sharply delineated but flexible and subject to change. What changes in actors' roles have become visible already and in what way does interdependence between Dutch and European actors become apparent?

Paragraph 5.6.4.1. will discuss the changing role of actors and paragraph 5.6.4.2. will consider the interdepence between actors. Paragraph 5.6.4.3. will set out starting points for a Dutch framework for assessing the role of actors and paragraph 5.6.4.4. will end with a conclusion.

5.6.4.1 Actors' changing roles

The role of European and national state actors as well as the roles of non-state actors is subject to change.

1) As harmonisation replaces treaties, provisions in treaties that can become directly binding cease to have this effect on the basis of articles 93 and 94 Gw. Instead, the priority and direct effect is based on European law and European actors also becomes responsible for the supervision of the enforcement and application of these treaties.

2) The priority and direct effect of international law may reinforce the role of European actors in the period before European measures ratifying treaties go into effect.

3) The reallocation of competences to interpret treaties to the European level may limit the role of the highest national courts that have to refer to the CJEU for the interpretation of these measures. If the CJEU does not refer to national decisions on treaties, this may oblige courts to interpret treaties differently.

4) European initiatives may oblige non-state actors to adapt codes of conduct. In some cases, existing self-regulation may gain a European background.

This is the case for the creditors' establishment of the BKR and the Association for the Guarantee of Travel Sums ('*Stichting Reisgelden*', 'SGR'),[788] in the area of package travel.

Framework agreements may also limit private parties' room to develop CAO's. European initiatives may also limit the role of actors in successful self-regulation, for example if Directive 93/13 stands in the way of collectively negotiated STC's that go below the protection in the Directive.

5) The approach of the European legislator may also replace indecisiveness from the national legislator, thereby limiting non-state actors roles. Also, a more active approach of European actors may prompt reconsideration of unsuccessful rules.

[788] The SGR was established after a number of bankruptcies, on the initiative of the Ministry for Economic Affairs and stakeholders. The SGR provides a refund if travellers have contracted with a SGR member that subsequently becomes insolvent. For more information see L.J.H. Mölenberg, M.L.A.M.J. Olivers, R.R.J.A. Hallmans, 'De Stichting garantiefonds Reisgelden; gegarandeerd verzekerd?', *TvC* 1990, p. 346 et seq. The majority of travel agents is a member of the SGR: by being a member, travel agents fulfil the conditions that were later made in article 7 Directive 90/314 on package travel: '[t]he organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.'

6) Both national and European actors may turn to alternative regulation as cross-border trade develops. The development of alternative regulation may not only entail a more prominent role for non-state actors; the roles of other actors may also be affected. For example, the role of the courts may be strengthened as they increasingly need to evaluate alternative regulation and gain competences accordingly. [789]

7) The prominent role of non-state actors, visible in the abundant amount of alternative regulation at the national level, may make the introduction of attractive European alternative forms more difficult, especially if non-binding initiatives overlook relevant Dutch initiatives.

8) The large role of non-state actors may also encourage non-state actors to experiment in the development of alternative regulation, thereby providing European and possibly foreign actors with interesting examples.

5.6.4.2 Interdependence

As the roles of actors has changed, interdependence has developed. Consequently, European and national actors may undermine or strengthen one another's initiatives. Firstly, interdependence between state actors has developed:

1) Dutch state actors are less able to control the reallocation of competence to develop private law as this question is decided at the European level.

2) Dutch state actors are less able to guarantuee the unity of the law as the private law *acquis* continues to develop.

3) European state actors do not have general competence to develop private law but are competent to pursue Europena policy aims through developing fragmented parts of private law. Euroepan state actors, meanwhile, have neither the expertise nor the organisational capacity to develop private law in the manner that is has been developed at the national level, which gives national private law a disctinct advantage.

4) Non-state actors may gain a more prominent role if European or international actors take Dutch alternative regulation as an example for drafting alternative regulation.

5) Non-state actors' roles may be restricted if European initiatives oblige state actors to establish legislation rather than self-regulaiton, or if European law itself directly limits state actors' roles.

As interdependence develops, the need for interaction becomes more urgent. On the one hand, more interaction may prevent problems, particularly between European and Dutch state actors. The potentially large role for European actors should be carefully considered by

[789] The introduction of the WCAM also entailed a larger role of the judiciary has received little attention. See as an exception Henkemans 2007, p. 30 who notes that the role of the judiciary seems to be a 'non-issue'.

national state actors, thereby limiting potential unpredictability or the development of new forms of governance that prove detrimental for the quality of private law. Likewise, the degree of development of both Dutch and German private law, should be a reason for European actors to follow the development of private law at the national level attentively and to exercise restraint in intervening with national private law.

Moreover, more interaction may be beneficial. Accordingly, European actors should also interact with national actors that may more easily identify relevant national actors and relevant self-regulation that may strengthen European initiatives. In turn, national actors should seek to prevent that European intiatives overlook relevant national initiatives, which may lead to a lack of responsiveness.

5.6.4.3 Towards developing a Dutch framework?

The development of a Dutch framework may contribute to the comprehensibility of European private law in various ways:

1) A normative framework may encourage state actors to intervene in the development of self-regulation. Especially if persistent problems with legislation or self-regulation arise, a framework may draw attention to the question whether these rules are developed by the right actors.
2) A framework would offer starting points for a more consistent approach to the role of actors and, correspondingly, to suggestions for extending the use of new governance approaches, which would also benefit the predictable development of private law.
3) Developing a framework would also entail the development of measures to ensure that self-regulation is drafted by representative actors. This may in turn lead to self-regulation that is responsive to business practices as well as other parties' interests, thus striking an adequate balance between parties' interests,
4) As more self-regulation is developed in accordance with principles of transparency, openness, inclusiveness and representativeness, this will increase the chance that parties are alert on relevant self-regulation, which in turn theoretically would lessen problems of inaccessibility that are currently visible in the GBL.

Thus, a framework would consistently and predictably outline the role of actors, both state and non-state actors, based on principles of of private autonomy and *Fremdbestimmung*, indicating the development of control mechanisms if actors likely pursue their own interests and develop one-sided rules accordingly. Thus, measures that help ensure transparency, representativeness and inclusiveness are more consistently developed. Simultaneously, as non-state actors gain a more prominent role, they have more responsibility to develop alternative regulation in accordance with benchmarks of predictability, consistency, accessibility and responsiveness. Accordingly, mechanisms are developed to ensure that alternative regulation meets these standards, These mechanisms can be developed by non-state actors, but ultimately, especially if alternative regulation is upheld and reinforced by state actors, these actors play an important role in safeguarding the quality of alternative regulation and ensuring that individuals are not subjected to rules without a proper basis.

The principles underlying the German framework and control mechanisms developed to mitigate potential *Fremdbestimmung* have also been recognised in the Dutch legal order. These starting points include article 6:1 BW, the recognition of the added value of

negotiations, and the development of mechanisms to mitigate one-sided rules or mechanisms to improve alternative regulation.

Firstly, article 6:1 BW reflects the idea that binding parties requires sufficient justification. Interestingly, although Dutch law is not a closed system, alternative regulation as such has not been recognised as a new category that should enable private parties to bind third parties. It is increasingly important, and in the multilevel legal order also increasingly difficult, for parties to be aware of rules by which they can be bound, which should prompt questions how the law should deal with potential surprises.

Secondly, the emphasis on the autonmy of both parties, the idea of égoism a deux and especially the appreciation for collectively negotiated CAO's. STC's and contracts shows that Dutch law recognises the added value of negotiations. These instruments are considered less one-sided than non-negotiated contracts. Simultaneously, the importance of equal bargaining positions has been recognised as mandatory law protects weaker parties.

Thirdly, it has been recognised that in some cases, non-state actors may pursue their own interests rather than the public interest, although this is not a general assumtpion. Accordingly control mechanisms limiting the role of non-state actors have been developed, particularly in the form of mandatory law, judicial control, and a controlled environment for collective negotiations.

Such a framework would arguably be better suited to the increasing role of non-state actors and the corresponding interdependence between state and non-state actors than the current *laissez-faire* approach.[790]

Particularly, this also entails that the role of state actors with regard to privately developed rules should be reconsidered. State actors' discretion to take privately developed rules as a starting point or disregard them should be reconsidered. Obliging state actors to take into account alternative regulation would become especially apparent in decisions where self-regulation has developed that has been recognised by private parties, that is particularly relevant for the assessments of parties' rights and obligations.

If alternative regulation increasingly meets standards of participation, inclusion and transparency, and if it is sufficiently comprehensible and complied with, this may not only lead to a more prominent role for self-regulation, but it may also justify a more critical approach towards development of law by state actors, especially in cases where the legislative process seems unduly slow or when non-state actors that are likely to pursue their own rather than the public interest play a too prominent role. If drafting process through which alternative regulation is developed is faster as well as more transparent and inclusive, should the legislative process still be preferred 'because it is democratic'?

5.6.4.4 Conclusion

The role of state actors and non-state actors under Dutch law shows both differences and similarities, which raises the question under which framework the role of actors should be determined. Arguably, the role of actors may be more consistently assessed at the national level, but European law may take precedence if European law has been established. Thus, both Dutch and European law may be relevant. Yet merely looking at the law may overlook

[790] Interestingly, A.J. Akkermans, 'Beter recht door herziening van ons beeld van de herkomst van rechtsnormen', *NTBR* 2011, 72, goes much further in recognising the increased role of non-state actors. He argues that creating a new paradigm is necessary. Rather than considering law as being developed by the legislator and the courts, a new paradigm should be more in accordance with the large diversity of groups that contribute to private law and interact with one another. Thus, the development of private law in the traditional sense, through the legislator and the judiciary on the one hand, and the development of private law through self-regulation on the other hand should no longer be a primary distinction.

the changes in the role of actors and the interdependence that has developed between actors. Therefore, this chapter has argued for the development of framework that take these characteristics in account, on the basis of private autonomy and *Fremdbestimmung*.

A Dutch framework could provide a 'middle road' between the German approach and the European approach. The Dutch legal order recognises both potential problems in the use of alternative regulation and adopts a bottom-up approach, which is in accordance with the restraint of the German legislator to the development of alternative regulation against a constitutional background. Moreover, the Dutch legislator has recognised the need to develop control mechanisms for alternative regulation, and recognises the need to limit parties' obligations to obligations based on contracts or on the law. Simultaneously, the Dutch approach is familiar with a pragmatic approach towards the development of alternative regulation. Also, the Dutch approach shows that various sorts of control mechanisms are possible. However, currently, a Dutch approach has not sufficiently developed to serve as an example for other actors. That does not mean however, that the initiatives that have been developed in the Dutch legal order, have not served as examples for actors from other legal orders.

Chapter 6: The role of actors and the development of European private law

6.1. Introduction

The previous chapters have asked what roles actors play in the development of European private law. The roles of actors under the German framework, Dutch law and European law show both similarities and differences. What consequences do the different roles of actors have for the way in which European private law is developed and the quality of private law?

Paragraph 6.2. will compare the framework in the German legal order with the proposed Dutch and European frameworks. Paragraph 6.3. will compare the role of state actors and paragraph 6.4. will turn to the role of non-state actors. Paragraph 6.5. will discuss the differences and similarities in the use of techniques. Paragraph 6.6. will draw some more general conclusions on the similarities and differences between the roles of actors and about the use of techniques in the development of European private law.

6.2. Frameworks for assessing the role of actors

The German framework is closely interrelated with the GG and principles of private autonomy and *Fremdbestimmung* have played a central role. The framework still distinguishes between the role of state actors and non-state actors, and the assumption that private actors generally pursue their own interests is still visible. Accordingly, the focus of the debate has been on preventing or limiting *Fremdbestimmung* arising from alternative regulation, especially where alternative regulation may affect the legal position of third parties that have not been involved in the drafting of alternative regulation. Mechanisms to prevent or limit *Fremdbestimmung* include giving third parties a chance to influence the development of alternative regulation, in some cases leading to the organisation of extensive drafting processes in accordance with requirements such as inclusiveness and transparency. Alternatively, the judiciary has developed judicial control over privately drafted rules.

In Dutch law, no similar framework has been developed. State actors play a central role. Other actors may also bind one another, but binding third parties requires sufficient justification. The possibility that private actors pursue their own interests, and weaknesses of alternative regulation have led to the development of control mechanisms and for suggestions to improve alternative regulation. In some cases, the lack of binding force has been considered an important problem, and alternative regulation has accordingly been reinforced. Thus, questions of party autonomy and *Fremdbestimmung* can serve as starting points for a Dutch framework while control mechanisms have also been developed.

However, some differences between the German and Dutch legal order have also become apparent. Questions of *Fremdbestimmung* have not played a role in the debate on alternative regulation and non-state actors have substantial room to develop alternative regulation. Also, Dutch actors have adopted a pragmatic approach that has led to alternative regulation, especially in the area of mass settlement, that may be difficult to reconcile with German views. Moreover, the development of alternative regulation is not considered against a constitutional background.

Similarly, European actors have not developed a comparable framework to determine the role of actors. However, the views of European actors, insofar as they have been

developed, are in some cases contrary to the German approach. In particular, the European Commission has adopted an instrumental approach that is not based on principles of private autonomy or *Fremdbestimmung*, but rather on pursuing European policy aims. This approach highlights the way in which private actors may contribute to the development of legislation pursuing European policy objectives.

Despite these differences, some starting points to develop a framework based on principles of private autonomy and *Fremdbestimmung* have been identified.

Notably, the different roles of actors, which have become especially apparent under German law and European law, draw attention to the interdependence between actors, as actors are no longer able to one-sidedly determine the role of actors. Moreover, one-sidedly determining the role of non-state actors is considerably more difficult if non-state actors provide expertise and organisational resources essential for the development of private law.[791]

6.3. State actors

The previous chapters have considered the role of state actors in the development of private law, both at a national and a European level. This paragraph will firstly compare the role of state actors, and go on to consider the development of private law beyond the national level, asking what consequences the similar or different roles of actors have for the quality of private law.

6.3.1. The development of private law at the national level

Both the German and the Dutch legislator and the judiciary play an essential role in the development of private law. Some similarities in the development of private law can however also be seen. Both German and Dutch private law have relatively recently been reformed, on the basis of similar reasoning.[792] Both the German and the Dutch legislator have extensively considered comparative law in the drafting of respectively the *Schuldrechtmodernisierungsgesetz* and the BW, and both codes make use of blanket clauses. Academics have played an important role in the drafting of both the *Schuldrechtsmodernisierungsgesetz* and the BW. Neither the Dutch nor the German legislator has extensively considered European initiatives in the drafting of both the BGB and the BW. Both the BGB and the BW leave considerable room for the judiciary.

Notwithstanding these similarities, some differences between the role of the legislature and the judiciary, and the relation between these two actors, have also become apparent:

1) Constitutional review

In the German legal order, the BVerfG has the competence to uphold the GG and set aside legislation, as well as judicial reasoning that is not in accordance with the GG. In contrast, there is no separate constitutional court in the Dutch legal order. Instead, article 120 Gw stipulates that the judiciary shall

[791] The consequences for interdependence between actors for the use of techniques will be considered further in chapter 7.
[792] See further for a comparison between the Dutch and the German project J.B.M. Vranken, 'De hercodificatie van het verbintenissenrecht in de Bondsrepubliek Duitsland', *NJB* 1985, p. 769. Comp. E. Kramer, 'Konvergenz und Internationalisierung der juristischen Methode', in: Meier-Schatz (ed.), *Die Zukunft der Rechts*, Helbing & Lichtenhahn: Basel/Geneva/Much 1998, p. 71, who has argued that legal methods more generally show signs of convergence.

not decide on the constitutionality of treaties or formal laws, that is, laws established by Parliament and the government under articles 81 Gw.

At the European level, the relation between the legislator and the courts differs in some important respects. Although the CJEU does have the competence to rule that European measures have been established *ultra vires*, it has adopted considerably more restraint than the BVerfG in its decisions. In general, also, the CJEU does not show a tendency to limit the Union's legislative competence in favour of Member States – quite the reverse![793]

The competence of the judiciary to evaluate the constitutionality of private law influences the relation between the judiciary and the legislature, as the legislature is subject to more control. Consequently, case law may become more important and reveal more insight in the way that substantial private law has developed.

The exercise of more control over the development of private law is subject to limtiations, as the judiciary does not, as such, evaluate the quality of private law, but its constitutionality. Therefore, constitutional review may improve the quality of law, for example by ensuring that it is in accordance with ideas on justice found in a constitution, but it may also undermine predictability.

2) Codification

Article 107 Gw stipulates that private law shall be stipulated in the code. A German equivalent of this article cannot be found in the GG. Although parts of private law fall within the exclusive competence of the federal legislator[794], article 74 GG stipulates that the competence to establish private law is a shared one. However, it has been argued that principles such as legal unity and the stable development of the law without inconsistencies may entail codification rather than ad hoc legislation. Inconsistencies that are more likely to arise if private law is developed on an ad hoc basis rather than codification may meet with constitutional objections, as they may give rise to suspicions of arbitrariness.[795] In contrast with both national legal orders, at the European level, legislative competence to establish a code is absent; instead, the legislative competence to develop private law follows from the TFEU which has led to the functional development of the private law *acquis*.[796]

Regardless of an express "codification provision" in the constitution, many legal orders have developed a codification. At the European level, this is not the case. However, despite arguments for a European Civil Code, it may be doubted whether a codification at the European level would contribute to the quality of private law.[797]

3) Legislative restraint

Whereas the German legislator has to justify not intervening, the Dutch legislator in general adopts restraint in developing legislation. The restraint of the European legislator also requires less justification than its interference, in accordance with the principle of conferred powers and subsidiarity.

Arguably, this has led to more initiatives to the development of self-regulation in the Dutch legal order. However, a closer look reveals that although the approach of the German legislator may be a more active one, the legislator and the judiciary have recognised the role

[793] See for example H. Unberath, A. Johnston, 'The double-headed approach of the CJEU concerning consumer protection', 44 *CMLRev* 2007, p. 1283. Comp. critically S. Weatherill, 'The limits of legislative harmonization ten years after Tobacco Advertising: How the Court's case law has become a drafting guide', *German Law Journal* 2011, p. 827 et seq.
[794] For example intellectual property law, see article 73 par. 1 sub 9 GG.
[795] M. Lieb, 'Grundfragen einer Schuldrechtsreform', *AcP* 1983, p. 347
[796] Comp. R. Zimmerman, 'Konturen einer Europäischen Vertragsrechts', *JZ* 1995, p. 491, who finds that a codification 'bedarf der ständigen Erprobung, Konkretisierung und Fortbildung ind er Praxis und die geistigen Dutchdringung durch die Wissenschaft.'
[797] See further chapter 7.

of private actors and have considered the development of self-regulation in a constitutional context. Nevertheless, the German legal order is more critical of self-regulation. At the European level, the lack of an equivalent of the *Untermaβverbot* has not withheld the European legislator from frequently intervening in private law, while alternative regulation has developed much less than is the case at the national level. Likely, however, this difference can be traced the European societal field that differs from national societal fields.

More legislative intervention may both contribute to the quality of private law as unsuccessful self-regulation is replaced, while a more pragmatic approach may also inhibit initiatives that may be beneficial for the responsiveness of private law.

4) Competence of the courts

The BGH has taken an active approach where the German legislator has left gaps. This difference could perhaps also be seen in the light of German state actors' duty to uphold the GG, if necessary by intervening through legislation,[798] or, if that is absent, through judicial decision-making.[799]

The Hoge Raad has been characterised as an 'assistant legislator' even before the amendments meant to strengthen its role in the development of the law.[800] Yet although case law has prompted legislation,[801] the Hoge Raad cannot oblige legislative intervention. Generally, the Hoge Raad exercises restraint, especially in cases where the law does not offer a clear indication what rule should be developed, and political considerations underpin the various possible options.[802] In exceptional cases, when the legislator is aware that current law leads to an unacceptable situation – which was moreover contrary to international law – the judiciary may provide rules.[803] In rare cases, the Hoge Raad has decided *contra legem*,[804] although there is some disagreement on what decisions are *contra legem* – does the Hoge Raad decide *contra legem* if decisions go against the wording of legal provisions or if decisions go against the bearing of the law?[805] The recent changes in the role of the Hoge Raad, which have been inspired by the previous House of Lords,[806] highlight the role of the Hoge Raad in the development of law.

The role of the CJEU differs because it is not concerned with developing private law within the framework of a code. Even where the Directives in the *acquis* show similarities – such as the use of similar blanket clauses or similar wording – this does not necessarily mean that the CJEU will provide consistent guidelines for the interpretation of these Directives, as the interpretation of these Directives also depends on the aim of Directives and the degree of harmonisation. Rather, the CJEU seeks to uphold and develop European law, in which it has played an active role.

Thus, the role of the courts may lead to divergences in the development of private law through blanket clauses. The constitutional role of German courts may moreover more easily

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[798] This may also entail that the lack of legislative intervention may become subject to a constitutional complaint if a duty to intervene clearly follows from the GG; comp. Epping/Hillgruber/Bek'scher Online-Kommentar GG/Morgenthaler (2012), article 93, nr 60.

[799] MunchKomm zum BGB/Säcker (2012) nr 152. See for example BAG 29 March 1984 - 2 AZR 429/83, *NJW* 1984, 2374, par.III d 3 a.

[800] J.M. Polak, M.V. Polak, 'Faux pas ou pas de deux?', *Netherlands International Law Review* 1986, p. 99.

[801] This is also the case in German law; see for examples D. Medicus, 'Entscheidungen des BGH als Marksteine für die Entwicklung des allgemeinen Zivilrechts', *NJW* 2000, p. 2926.

[802] HR 23 September 1988, *NJ* 1989, 740.

[803] HR 12 May 1999, *NJ* 2000, 170.

[804] Decisions that have been characterized as contra legem include for example HR 21 March 1986, *NJ* 1986, 585, where the Hoge Raad held, against the background of article 8 ECHR, that article 1:246 BW that stipulated that parental autohrity could only exist if parents were married did not stand in the way of joint parental authority of the parties who were not married. Comp. also HR 19 December 1975, *NJ* 1976, 537, where the Hoge Raad decided that article 1:150 BW that stipulates that divorce can be declared between spouses that have not been legally separated, in which case article 1:179 et seq BW are exclusively applicable does not stand in the way for declaring divorce in a case where one party had claimed for divorce, the decision on which had not yet become final while legal separation that was simultaneously claimed had been declared.

[805] G.J. Wiarda, *3 typen van rechtsvinding*, with comments from T. Koopmans, Tjeenk Willink: Zwolle 4th ed., p. 39-40. Comp. the definition of T.J.M. Möllers, ' Doppelte Rechtsfortbildung contra legem? Zur Umgestaltung des Bürgerlichen Gesetzbuches durch den EuGH und nationale Gerichte', in: H. Schlosser (ed.), *Bürgerliches Gesetzbuch 1896-1996*, Müller: Heidelberg 1997, p. 154, 181.

[806] Commissie normstellende rol Hoge Raad, *Versterking van de cassatierechtspraak*, The Hague, February 2008.

mitigate problems arising from inflexible law. Koziol[807] has argued that in some cases, the German legislator has opted for rules that leave too little room for discretion or pragmatic solution. Koziol[808] has found that this may be a reason for the increasing recourse of the German judiciary to blanket clauses, while he doubts that these blanket clauses – in particular articles 242 and 826 BGB are a sufficient basis for the rules that have been developed on the basis of good faith, which, as such, is a very broad concept that does not necessarily clearly indicate how individual cases should be decided. Therefore, the prominent role of German courts may increase the responsiveness of private law but decrease predictability. For foreign parties, moreover, these developments may not be particularly accessible.

Furthermore, importantly, the different role of the CJEU should be a reason to show more restraint in the use of blanket clauses in the *acquis*, as it may well lead to inconsistencies within the *acquis*.[809] Moreover, the quesiton arises whether the CJEU has similarl possibilities to mitigate inflexbility of the law or other potential problems.

5) Anticipation

The active role of the Hoge Raad has moreover meant that judges have anticipated on the introduction of the BW, deciding cases on the basis of rules that not yet gone into force. In some cases, judges have also anticipated on Directives that had not yet gone into effect.[810] In contrast, German judges have not anticipated the *Schuldrechtsreform*, especially because the decision of the legislator to reform the BGB, after years of silence, came as a surprise. The German judiciary has however anticipated Directives if they have not been timely implemented.[811]

The role of the CJEU differs as it cannot 'anticipate' Directives – even if Directives still need to be implemented, a complaint before the CJEU requires that the Directive has already been established. In the case of Directives in the process of reform, the CJEU has not been known to anticipate future amendments. Doing so would be difficult to reconcile with the principle of conferred powers, especially as proposed amendments may be controversial. This also means that the CJEU, if it anticipated on proposal, runs the risk of anticipating a rule that will not become law. In exceptional cases, however, the CJEU[812] has obliged Member States to set aside legislation even though the Directive obliging Member States to do so had not yet become effective.

Thus, the stable development of private law also provides the judiciary with the opportunity to make legislative changes more smooth, ensuring more predictability and consistency in cases of recodification.

6) Judicial evaluation of alternative regulation

The German judiciary have played a more important role in evaluating alternative regulation as it has developed an active approach in subjecting privately drafted rules to judicial evaluation to prevent *Fremdbestimmung*. The Dutch judiciary is arguably not similarly constitutionally bound to prevent *Fremdbestimmung*, and the Dutch judiciary has accordingly not developed a similar approach to evaluating contracts. However, the Dutch judiciary does have room to intervene in obligations as articles 6:2 and 6:248 BW stipulate that obligations also have consequences that follow from the law or from fairness, while the judiciary may also set aside obligations if that would have consequences that are unacceptable from the perspective of fairness. In rare cases, the Hoge Raad has allowed fairness in the meaning of article 6:2 BW to play a central role in decisions: thus, the claim of a young

[807] H. Koziol, 'Glanz und Elnd der deutschen Zivilrechtsdogmatik', *AcP* 2012, p. 7-8.
[808] H. Koziol, 'Glanz und Elnd der deutschen Zivilrechtsdogmatik', *AcP* 2012, p. 56.
[809] See further on the use of blanket clauses par. 7.4.
[810] Ktr. Zaandam 2 April 2009, *NJF* 2009, 278. Comp. also Rb. Haarlem 25 June 2008, *IER* 2009, 6.
[811] BGH 24 May 1995 - XII ZR 172/94, *NJW* 1995, 2034.
[812] CJEU 22 November 2005 (Mangold v Helm), C-144/04, [2005] ECR, p. I-9981.

widower who had murdered his elderly wife for the inheritance was denied on the basis of article 3:166 par. 3 and 6:2 BW.[813]

The role of the German and the Dutch clearly differs from the CJEU. Even though the private law *acquis* refers to good faith and fairness, as the CJEU has insufficient insight into the factual background of cases to come to similar decisions, which will also depend on national law.

The development of judicial evaluation has resulted in a relatively consistent and predictable approach in the German legal order to alternative regulation that ensures that non-state actors cannot impose one-sided rules on third parties, in accordance with ideas on justice. However, judicial evaluation may also decrease the extent to which parties can rely upon privately drafted rules.

Thus, the differences and similarities between the roles of national state actors do not lead to drastic differences in the way that private law is developed. A prominent role of the courts is visible both at the national and the European level. This role may both strengthen and weaken the quality of private law.

An important difference, however, is the evaluation of alternative regulation by the German courts, limiting the role of non-state actors, which may both benefit and impair the quality of private law.

Another difference that has likely led to more legislation and less alternative regulation is the *Untermaβverbot*, which may both undermine and strengthen the quality of private law.

6.3.2. The role of actors beyond the national level

In the Dutch legal order, European law has direct effect, not on the basis of articles 93 and 94 Gw, but on the basis of European law. International law may have direct effect on the basis of articles 93 and 94 Gw.

In contrast, international and European actors have a less prominent role as international law, with the exception of international law falling within the scope of article 59 GG, has no direct effect, and the direct effect and the priority of European law is based of European law is based on the GG, while a central role is reserved to national state actors.

The influence of the ECHR makes clear that there are fundamental differences with regard to the effect of international law in the German and the Dutch legal order. In the Dutch legal order, the ECHR has direct effect and may set aside legislation – something that the judge cannot do on the basis of the constitution. In extreme cases, the continuous breach of international law may lead the judiciary to set aside its restraint and provide rules.[814] In contrast, in the German legal order, the ECHR has no direct effect in the German legal order but has been ratified and implemented in German law.[815] The ECHR also cannot set aside legislation as the law implementing the ECHR is “only” a formal law that does not stand above other laws in the way that the GG does. However, the BVerfG frequently refers to the ECHR, which has gained a more important role through the sheer amount of case law that it produces. Also, inconsistencies between formal laws allow for arbitrariness, which is undesirable from a constitutional point of view. Other approaches are also visible in the European Union: although

[813] HR 7 December 1990, *NJ* 1991, 593.
[814] HR 12 May 1999, *NJ* 2000, 170.
[815] Maunz/Dürig, Grundgesetz-Kommentar /Herdegen ,65. Ergänzungslieferung 2012, article 25 GG, nr 22. Ratified treaties are published in the Bundesgesetzblatt, part II, see http://www1.bgbl.de/?id=2567. If treaties have been implemented in German law, they are freely available online, at http://www.gesetze-im-internet.de/.

international law also has to be implemented in English law, the judiciary has adopted far more restraint towards evaluating the role of the government deciding to join the EU.[816]

In addition, the European legislator may both support and inhibit the effect of international initiatives. If the European legislator has taken into account international initiatives, this will generally mean that this approach will subsequently also be adopted by national actors, in particular if the European legislator has chosen to initiate binding harmonisation that takes international guidelines as an example.

In contrast, if the European legislator has not followed the approach of international actors, national state actors may only takes these initiatives into account insofar as that does not breach their obligations to correctly implement European measures.

As both international, European, Dutch and German actors show a preference for legislation, the increasing role of especially European actors does not drastically affect the way in which private law is developed. The quality of private law may both improve and diminish the quality of private law. If European actors initiate harmonisation in areas falling within the scope of treaties, this may contribute to the consistent interpretation of treaties throughout the Union. However, if he CJEU does not follow previous national decisions on treaties, this may decrease predictability.

6.4. The role of non-state actors

The previous chapters have also looked at the role of non-state actors in the development of European private law. Paragraph 6.4.1. will compare the role of non-state actors in general. Paragraph 6.4.2. will consider the effects of the role of non-state actors on the way in whcih private law is developed.

6.4.1. The role of non-state actors compared

The increasing role of non-state actors has been recognised in both the German legal orders. Academics and stakeholder groups may play an important role in the development of private law.

Interestingly, various similar non-state actors may play an important role in both the Dutch and German legal order, which has led to the development of alternative regulation in similar fields. Thus, professional organisations, unions and sports' organisations are left with extensive room to develop alternative regulation.

In addition, self-regulation in the area of consumer sales and advertising[817] are well-developed, while similar initiatives for increasing the access to basic payment accounts, corporate governance, and corporate social responsibility are visible. Especially in areas where similarities arise, it may be attractive for actors to look at corresponding developments.

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[816] Comp. *High Court (R. v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* (1994) 1 All ER 457 at 469, in accordance with Lord Denning MR from *Blackburn v. Attorney-General* (1971) 2 All ER 1380, the case in which Britain's decision to join the European Community was challenged: "The treaty-making power of this country rests not in the courts, but in the Crown; that is, Her Majesty acting on the advice of her Ministers. When her Ministers negotiate and sign a treaty, even a treaty of such paramount importance as this proposed one, they act on behalf of the country as a whole. They exercise the prerogative of the Crown. Their action in so doing cannot be challenged or questioned in these courts."

[817] However, whereas the development of the Dutch code has taken place within the framework of article 6:162 BW, the German code expressly rejects this approach and instead seeks to provide "ethical" rules. The development of these "ethical" rules is also a clear reason to leave the development of these rules to private actors, as state actors are not well placed to enforce rules that go beyond what is legally required. The different characterisation of the Dutch and German code also has consequences for the development of the code. In the Dutch legal order, compliance with the code should be increased by the cooperation between the *Consumentenautoriteit* and the *Stichting Reclame Code,* available at https://www.reclamecode.nl/bijlagen/11-7-2011_13_46_12.PDF./

Notwithstanding these similarities, some differences also become apparent:

1) The role of private actors is more controversial in the German legal order.

The German legislator or judiciary may be constitutionally obliged to intervene if alternative regulation leads to *Fremdbestimmung*. This may complicate ensuring compliance with self-regulation - especially problems with dynamic referral make additional measures to ensure compliance with for example international sports' rules necessary. The German legislator seems unwilling to reinforce privately drafted rules with hard law, but rather imposes a duty on private actors to report their compliance with self-regulation, or expresses the expectation that compliance with privately developed rules will constitute good practice. Self-regulation may also be enforced on the basis of contracts, articles of association, or tort law, and instances in the German legal order that are not reinforced on a contractual or other basis seem rare, but do exist – for example the *Werbekodex*, or the initiative for basic payment account.

The controversy on the role of non-state actors also becomes clear from the potential propblems surrounding the involvement of stakehodler groups in the development of *Sonderprivatrecht*, especially in highly specialised, rapidly developing areas in need of swift legislative intervention. The drafting of the financial market stabilising act ('*Finanzmarktstabilisierungsergänzungsgesetz*') by attorneys has given rise to the question whether the involvement of private actors was in accordance with article 33 par. 4 GG that stipulates that the execution of legislative competences should be left to public services.[818] More generally, the involvement of private actors has been criticised, in accordance with the assumption that private actors mainly pursue their own, and not the public, interest.[819] Interestingly, Kloepfer[820] expressly distinguishes the involvement of stakeholders from the involvement of academics. He considers that academics pursue the public interest, instead of particular aims, while their broad and systematic view makes their participation in the drafting of codifications, in his opinion, particularly useful.

In the Dutch legal order, similar objections have not developed and alternative regulation also seems more easily reinforced with hard law, and subject to less control once it has been developed.

In the drafting of the Civil Code, practitioners and other interested parties have been involved, but especially experts have been given a central role in the drafting process.[821] The involvement of legal experts and involved practice is currently an established practice, as shown in other important legislation on private law, for example, in the reform of insurance contract law[822] and the attempt to reform insolvency law.[823]

At the European level, the role of non-state actors is also less problematic than is the case under the German framework. Typically, the initiatives of non-state actors are reinforced, while these initiatives are subjected to relatively mild control mechanisms.

Restraint with regard to the role of private actors is not visible at the European level, where the initiatives of private actors may prompt legislative measures. This was for example the case in Directive 98/26 on settlement finality and Directive 2002/47 on financial collateral arrangements. The drafting of the Settlement Finality Directive was prompted by reports from the Bank for International Settlements[824] that called for minimum standards for the operation and design for cross-border multi-

[818] Comp. W. Wieland et al, *Privatisierung der Gesetzgebung durch die Erstellung von Gesetzentwürfen durch Rechtsanwaltskanzleien*, Kleine Anfrage 19.3.2012, BT-Drs.:17/9026. See further on constitutional problems J. Krüper, ´Lawfirm – legibus solutus?´, *JZ* 2010, p. 655.
[819] Augsberg 2001, p. 232, similarly Köndgen 2006, p. 523.
[820] M. Kloepfer, 'Gesetzgebungsoutsourcing – Die Erstellung von Gesetzentwürfen durch Rechtsanwälte', *NJW* 2011, p. 134.
[821] The research on the Dutch Civil Code was conducted initially by Prof. E.M.M. Meijers, later by Prof. J. Drion, Prof. J. Eggens en mr. F.J. de Jong, judge in the *Hoge Raad,* and adopted after extensive consultation among legal academics and legal practice. See further E.O.H.P. Florijn, *Ontstaan en ontwikkeling van het nieuwe Burgerlijk Wetboek*, UPM: Maastricht 1994.
[822] The draft bill was edited and revised by prof. T.J. Dorhout Mees, and, after an extensive consultation, commented upon by legal practitioners and involved parties such as insurers: Asser/Clausing/Wansink 2007 (5-VI), nr. 9.
[823] The draft bill was edited by the Commission on Insolvency law, chaired by prof. S.C.J.J. Kortmann. Comments are available at the website of the Ministry of Justice, http://www.justitie.nl/onderwerpen/wetgeving/insolventiewet/.
[824] Bank for International Settlements, *Report of the committee on interbank netting schemes of the central banks of the group of ten countries (Lamfalussy Report)*, Basle November 1990, p. 2-3, available at http://www.bis.org/publ/cpss04.pdf, Bank for International Settlements, *Delivery versus payment in securities settlement systems*, Basle September 1992, available at

currency netting systems, as well as enhancing the finality of transfers and settlements in domestic markets in order to limit risks and costs arising in cross-system settlements.[825]

The European view emphasises the added value of including private actors in the development measures pursuing European policy aims. In contrast to the German view, the possibility that private actors do not pursue the public interest but their own interests has not been considered. Rather, the initiatives of private actors are seen in the light of European policy aims. Consequently, the European view does not, as such, seem to recognise problems that may arise if private actors are very prominently involved in the legislative process. However, from a German perspective, the prominent involvement of private actors may open up the possibility that legislation is drafted one-sidedly.

What consequences does this have for the quality of private law?

The restraints on the roles of private actors have motivated state and non-state actors to reinforce alternative regulation, which may enhance the predictability of the law. Similarly, non-state actors have played a role in the drafting of legislation, although in the German legal order, objections may arise against a too far-going interdependence between the legislature and interest groups. However, Dutch actors have similarly recognised enforcement as a weakness and accordingly reinforced alternative regulation. German initiatives moreover make alternative regulation and compliance more accessible.

2) The Dutch approach to alternative regulation is more bottom-up.

This becomes visible in the failure of the *standaardregeling*[826] and the corresponding success of collectively negotiated STC's, as well as the development of the corporate governance codes and corporate social responsibility. Thus, alternative regulation is not necessarily as organised by state actors as German alternative regulation, which has however not limited the amount of alternative regulation.

The European legislator has adopted a top-down approach, and considers the initiatives of private actors in the light of European policy aims. Alternative regulation that has developed beyond the national level is rare and if it exists – for example the EMOTA Convention – it need not necessarily be taken into account by European actors.

What consequences does this have for the quality of private law?

The Dutch bottom-up approach has not lessened the amount of successful alternative regulation, although initially, problems of enforcement arose that were tackled more efficiently in the German legal order. The supervision in the German legal order seems a better guarantuee for ensuring the inclusiveness of alternative regulation as well as the accessibility. In contrast, the European approach may undermine responsiveness, consistency, and accessibility, as it may lead to multiple sets of alternative regulation, and the relations between them may not be directly visible.

3) The development of alternative regulation against a constitutional background.

Dutch or European actors generally do not consider the development of alternative regulation as a means to exercise consitutional rights, with the exception of collective labour agreements. In the German legal order, private autonomy, protected by article 2 GG, and the freedom of association in article 9 GG leave private actors with a wide range of discretion to develop self-regulation.

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http://www.bis.org/publ/cpss06.pdf, Bank for International Settlements, *Cross-border securities settlements*, Basle March 1995, par. 1.4, available at http://www.bis.org/publ/cpss12.pdf?noframes=1. The Directive was established in close cooperation with experts and stakeholders: see COM (1996) 193 final.

[825] For example, transfers and settlements between domestic systems and international central securities depositories (ICSD's) that can make transfers and settlements within their own payment and securities systems.

[826] See previously par. 5.4.1.1. and below, par. 11.3.2.

However, the lack of constitutional background makes it less likely that the Dutch or the European legislator will strive to protect the role of non-state actors, making legislative intervention subject to less restraint. In the German legal order, the limitation of the roles of private actors may be problematic from a constitutional point of view.

What consequences does this have for the quality of private law?

The constitutional background may improve the stable development of private law, as legislative intervention in areas where alternative regulation was established is likely to be better motivated. Notably, the lack of a constitutional background has however not made the Dutch legislator more decisive, and weak alternative regulation that does not cope well with business practices may more easily continue to exist in the Dutch legal order.

6.4.2. The role of non-state actors and the development of private law

The increasing role of non-state actors is role may affect the way in which private law is developed in various ways:

1) The increasing role of non-state actors may benefit the development of legislation as academics, who play an important role in both legal orders, support the drafting of legislation.

2) The involvement of non-state actors may also lead to more alternative regulation, while academics may also be involved in the drafting of alternative regulation.

Importantly, the success of self-regulation could also be sought in the level of expertise, the support within a sector, the extent to which that sector is organised, the clarity of rules contained in self-regulation. Moreover, societal pressure may also accelerate the development of self-regulation.[827] Van Driel[828] already stated that for the effectiveness of self-regulation, it is imperative that a branch is sufficiently organised and is both legally and in fact able to enforce self-regulation. However, as self-regulation is increasingly developed and private actors gain a more important role, these actors may more easily have the resources to develop successful self-regulation.

3) Non-state actors may be more internationally oriented than state actors. Whereas state law often takes national concepts as a starting point, non-state actors frequently emphasise the relevance of international developments – they may be members of international organisations,[829] or modelled on international organisations,[830] or they may find that representation at a transnational level may be useful as transnational rules are well suited to deal with transnational practices.

4) Non-state actors may seek to play a prominent role in the development of a particular set of rules on a particular subject and accordingly take foreign and international

[827] B. Baarsma et al, *Zelf doen? Inventarisatie van zelfreguleringsinstrumenten*, SEO Report 664, 2003, p. 30-31.
[828] M. van Driel, *Zelfregulering: Hoog opspelen of thuisblijven*, Kluwer: Deventer 1989, p. 75-76.
[829] This is especially the case for sports' associations.
[830] For example, the DRSC is modelled on successfull international and foreign organisations, and may advise the Minstry with regard to legislative initiatives on accounting standards and representation of Germany in international accounting organisations. See further MunchKomm zum HGB/Ebke/Paal, article 342, nr 3. W.D. Budde, E. Steubner, 'Normsetzungsbefugnis eines deutschen Standard Setting Body', *DStR* 1998, p. 1181 note that the development of article 342 HGB can be traced back to Directive 78/660.

developments into account, as was the case for the *Nachhaltigkeitskodex*[831] and the corporate governance *Kodex*.[832] Apparently, a more prominent role of non-state actors does not necessarily decrease instances of regulatory competition.

A particularly interesting examples for alternative regulatory competition in the German legal order is the development of the *Nachhaltigkeitskodex*. It will be interesting to see whether this initiative will be more successful than the Dutch initiative – the emphasis of the German approach on transparency and statements of compliance, as well as the evaluation of the *Kodex*, seem however more promising than the *laissez faire* approach of the Dutch legislator. The cooperation developed in the area of consumer sales by Trusted Shops may also provide an interesting example of successful self-regulation for other legal orders.

Similarly, the consistent analysis for upholding or not upholding contracts and the judicial control of STC's in accordance with the *Richtigkeitsgewähr* may provide particularly interesting starting points for other legal orders as well.

Similarly, interesting Dutch examples are mass settlements on the basis of contractual settlements and the introduction of a national prejudicial procedure.

Collectively negotiated STC's are also well-established and relatively successful. However, the attractiveness of this option for other Member States also depends on the question whether the use of collectively negotiated STC's is limited under Directive 93/13.

Additionally, many codes of conduct have developed in the Dutch legal order. Some of these codes, especially in the area of consumer sales, may also be interesting for foreign businesses, but the accessibility of these codes of conduct and trust marks also depends on the question whether the codes, trust marks and collectively negotiated STC's are sufficiently available to foreign businesses that may not have an extensive command of Dutch. Other codes of conduct are currently little known among Dutch consumers. However, if courts would choose to bind businesses who have committed themselves to these codes, this could change, and provide an interesting source of information to foreign or transnational actors.

Currently, initiatives at the European level may be interesting for Dutch actors. Particularly, the development of guidelines for the interpretation of blanket clauses and committees reminiscent of comitology committees have been suggested.[833]

5) Interestingly, however, the prominent inclusion of private actors may in turn affect the development of legislation, if for example interdependence between state actors and non-state actors develops and the "threat" of legislative intervention decreases, but also if a prominent role of well-organised non-state actors may make state actors less decisive.[834]

6.5. Conclusion

This chapter has asked how the differences and similarities betwee the roles of actors have affected the way in which private law is developed and how the quality of private law is affected.

Many similarities between the German, Dutch and European legal order can be found. These similarities include the prominent role of the legislature and judiciary, the prominent role of academics, and the use of alternative regulation in various functionally developed areas.

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[831] For example, internationally developed standards for reporting on sustainable development, such as the standards from the Global Reporting Initiative (GRI), have been taken as a starting point in the drafting of the *Nachhaltigkeitskodex* RNE, *Der Deutsche Nachhaltigketiskodex*, version of January 2012, p. 3.
[832] Ringleb, 'Vorbemerkung', Ringleb et al (eds.), Deutscher Corporate Governance Kodex, 4th ed., 2010, VI, nr. 29 et seq.
[833] See further par. 11.7.3.
[834] U. Di Fabio, 'Verlust der Steuerungskraft klassischer Rechtsquellen', *NZS* 1998, p. 450.

Various important differences are visible with regard to the role of European and international actors and the relation between the legislature and the judiciary. Moreover, the role of non-state actors may differ.

More involvement of either state or non-state actors does not diminish or enhance the quality of private law as such. The ideal role of actors depends on the area of law, especially important characteristics of that area such as the expertise needed for intervening in a particular field, the rapid development of an area, or the involvement of weaker parties. The capabilities of non-state actors – their expertise and their experience, as well as their organisational capacity and the support that they have from members – may also play an important role. Principles of private autonomy and *Fremdbestimmung* can provide starting points for a framework that can consistently determine the roles of actors.[835] Notably, such a framework does not stand in the way of developing alternative regulation, nor does it mean that actors have to overlook potential benefits of alternative regulation.

Importantly, also, despite the different role of actors, the way in which private law is developed does not differ dramatically. German, Dutch and European actors share a preference for legislation. Both the German and Dutch legislator have developed codifications and blanket clauses in those codifications leave the judiciary considerable room for developing private law further. Academics play a prominent role in the development of these codes, and European actors have chosen to prominently include academics in European projects.

State actors have also recognised the use of privately drafted rules, and in many similar areas, alternative regulation has developed.

The differences in the approach towards actors' roles have also led to some differences in the way in which private law is developed. Thus, in the German legal order, there is less co-regulation than in the Dutch legal order, while European actors also encourage co-regulation more. Interestingly, although objections to dynamic referral have been emphasised in the German legal order, the legislator has made more successful use of this technique than the Dutch legislator. Non-state actors are left more room for experimentation in the Dutch legal order, which in turn has allowed for innovative alternative regulation that has been taken into account by other actors developing or encouraging alternative regulation. The less active approach of Dutch actors has however also allowed for more ineffective alternative regulation than is visible in the German legal order

More generally, the German legislator has shown more restraint than Dutch or European actors in allowing private actors to impose binding rules on other parties, unless this is the result of the law or of negotiations. Accordingly, the German judiciary has developed a more active and more consistent approach to the evaluation of alternative regulation than either the Dutch or European courts. Moreover, only the German legal order has considered that the development of alternative regulation can have constitutional dimensions. Because of this constitutional dimension, the German legislator is more likely to continue to adopt restraint than is the case in the Dutch legal order or at the European level.

What consequences do these differences and similarities have for the way in which private law is developed in the multilevel legal order? If the comparison of two reasonably similar Member States already shows differences, differences with other Member States may also become apparent. On the one hand, the similar way in which private law is developed despite differences with regard to the relation between the legislature and the judiciary, and

[835] Comp. also G. Bachmann, *Private Ordnung*, p. 54: 'Eine Abstrakte Abwägung dieser Vor- und Nachteile [von Selbstregulierung] is nicht möglich. Selbst auf konkreter Ebene dürfte es immer noch schwer fallen, sie in ein messbares Verhältnis zu bringen.'

the roles of international actors, indicates that differences in the roles of actors need not necessarily lead to the radically different use of techniques. On the other hand, the different roles of non-state actors does make a difference for the development of private law through alternative regulation. This may in turn be important for the success of European initiatives for alternative regulation

Chapter 7: The use of national techiques in the development of European private law

7.1. Introduction

In the multilevel legal order, state actors have become interdependent; they have become less able to independently guarantee the predictability, accessibility, consistency and responsiveness of private law. This interdependence entails higher standards for the process through which private law is developed. In particular, sufficient interaction between actors is important. Simultaneously, the development of European private law has become more complicated – more actors are involved and more complex, cross-border problems need to be resolved – making it more difficult for actors to meet these standards.

This chapter will ask whether actors in the use of national techniques, have adequately taken into account that other actors develop private law, which can limit the extent to which national techniques can contribute to benchmarks of predictability, accessibility, consistency and responsiveness, and how the use of techniques affects the quality of European private law. According to the debate on multilevel governance, recognition of interdependence and interaction may enable actors to benefit from the existence of other actors; however, if it is not the case, problems may arise. Thus, the interdependence between actors and the need for interaction between actors points to a more careful use of techniques, that can cope with the coexistence of actors, the interdependence between actors, the need for interaction, and the dynamic nature of the European legal order.

Yet notably, an optimal use of techniques would automatically lead to "perfect" private law. However, problems in the use of techniques may lead to problems for European private law, and improving the use of techniques, and solving those problems may benefit European private law. This means that:

- The coexistence or actors is problematic if actors undermine one another's contributions towards more comprehensible European private law. Actors need not purposely do this; but if actors do not take into account that other actors simultaneously develop European private law, the chance that they subsequently undermine one another's actions increases.

- The coexistence of actors is beneficial if actors reinforce one another's contributions towards a more comprehensible European private law. If actors take into account the existence of and dependence on other actors, and interact with one another, this increases the chance that they will take advantage of insights from other actors and that their simultaneous efforts reinforce one another – although this may not necessarily be the case.

Paragraph 7.2. will discuss the use of codifications and paragraph 7.3. will turn to the use of soft laws. Subsequently, paragraph 7.4. will consider blanket clauses and paragraph 7.5. will analyse the use of general principles. Paragraph 7.6. will draw general conclusions.

7.2. The use of codifications in a multilevel legal order

Have legislators taken into account that other actors also develop private law and have they accordingly interacted with these actors? How has their approach affected the extent to which codifications increase predictability, accessibility, consistency and responsiveness of European private law?

This paragraph will focus on two instances where interaction may prove especially necessary. Paragraph 7.2.1. will ask whether the implementation of the private law *acquis* into codifications contributes to the stable, consistent and accessible development of European private law. Subsequently, paragraph 7.2.2. will ask whether the use of codifications in areas with inherent cross-border aspects, such as private international law or transport law, contributes to the accessible, consistent and stable development of European private law within the framework provided by the code. Paragraph 7.2.3. will end with a conclusion.

7.2.1. The implementation of the *acquis* within codifications

Why have the German and Dutch legislator emphasised the role of the codification in the ongoing development and implementation of the private law *acquis* and have legislators sufficiently recognised the capability of codifications to accomplish this in the light of the ongoing development of the private law *acquis*?

Both the German and the Dutch legislator have opted to implemented the private law *acquis* into national codifications. This strategy has a number of reasons.

1) The implementation of Directives into the Civil Code furthers the accessibility of private law as the national Civil Code retains a prominent role for national private law.

Rösler[836] adds that implementing the *acquis* into the Civil Code also enhances the visibility of consumer contract law and might lead to 'simplification' of private law. This argument is however not very convincing as implementation of consumer law within the Civil Code can simultaneously lead to problems of clarity and accessibility: of many provisions implemented in the Civil Code, the "European background" is unclear, and parties may therefore overlook relevant CJEU case law.

2) The development of specific laws alongside the Civil Code, which might lead to fragmented development of private law, and resulting inconsistencies, is prevented.[837]

However, in the German legal order, the aim to retain the important role of the BGB[838] may arguably be undermined by the simultaneous development of legislation implementing the private law *acquis*[839] alongside the BGB.[840]

Moreover, the implementation within the Civil Code does not effectively inhibit the fragmented and inconsistent development of private law; rather, the development of fragmented, specific laws at the national level is prevented. The development of some private law rules take place regardless of

[836] H. Rösler, 'Europeanisation of private law through Directives – Determining factors and modalities of implementation', *European Journal of Law Reform* 2010, p. 316-317.
[837] *Handelingen I*, 2004/05, 28 874, nr. 17, p. 759-760.
[838] R. Zimmerman, *The new German law of obligations, Historical and comparative perspectives*, OUP: Oxford 2005, p. 226.
[839] Comp. for example the Produkthaftungsgesetz (Product Liability Act), or the Wohnungseigentumsgesetz (Act on the property of residences).
[840] Zimmerman 2005, p. 198.

the rules within the national Civil Codes, or the subsequent implementation of those rules into the code, which may well lead to inconsistencies. The implementation of European concepts that are identical to national concepts within the Civil Code may moreover lead to the development of identical concepts with divergent meanings within one law.[841] Arguably, if such concepts are to be introduced, implementation should preferably take place outside the Civil Code, or in a separate part of the code, as this could at least indicate that concepts in these laws, although identical to concepts in the Civil Code, may have to be interpreted differently, in accordance with European law.

Maybe, experiences from other legislators will show that implementation within separate books of a code, or even separate legislation, may also ensure the interrelation between different provisions within the code.

3) The Dutch legislator[842] holds that, by implementing the private law *acquis* within the Civil Code, it becomes clear which parts of simultaneously applicable private law should be reconciled with the *acquis*.

It can be doubted whether this implementation technique has been successful in this respect. For example, rules on the unfairness of standard contract terms and the effects of unfairness have been interpreted in conformity with the national principle of fairness in article 6:248 BW rather than in conformity with European rules.[843] Similarly, German courts have shown restraint in referring questions on the interpretation of article 307 BGB to the CJEU as it concerns a central notion of German law.[844] Moreover, German case law on STC's developed on the basis of article 242 BGB, and the idea that STC's should be subjected to judicial evaluation is still based on the notion that the user of STC's may have misused the freedom of contract to impose rules to his advantage on his contract party, which is more generally contrary to good faith.[845]

4) By implementing the *acquis* within the Civil Code, the coherence established by the Civil Code should be preserved

It may be doubted whether this is possible at all, because the ongoing harmonisation of private law does not consider the coherence of private law at a national level.[846] Also, implementing the *acquis* within the Civil Code may make the code vulnerable with regard to amendments as well as new harmonisation – as the *acquis* is reformed, the Civil Code will have to be amended as well, and as harmonisation of private law continues, the Civil Code will have to be increasingly adapted. Accordingly, Zimmerman,[847] finds that incorporation did not improve the quality of the BGB, but instead brought with it the need for repeated amendments after 2002 reform. The need to regularly amend the Civil Code in accordance with the *acquis*, the development of which may be hard to predict, may in that case also undermine the stable – and thereby predictable – development of private law.

The question whether the private law *acquis* should be incorporated in the BGB or not should also be seen against the distinction between the BGB and *Sonderprivatrecht*.[848] Whereas the BGB contains rules on 'general' private law, *Sonderprivatrecht* seeks to develop rules targeted at a specific group such as consumers, usually from a political perspective. As the development of such 'special' rules is considered to be less stable, keeping these rules outside the BGB may reduce the need to regularly amend the BGB – which is in accordance with the stable development of the BGB – and

[841] W.-H. Roth, 'Europäischer Verbraucherschutz und BGB', *JZ* 2001, p. 482, speaks of '*Begriffsinseln*' as well as '*Begriffsspaltungen*' within the Civil Code.
[842] *Handelingen I*, 2004/05, 28 874, nr. 17, p. 760, similarly H. Rösler, 'Europeanisation of private law through Directives – Determining factors and modalities of implementation', *European Journal of Law Reform* 2010, p. 317.
[843] Comp. HR 14 June 2002, *NJ* 2003, 112.
[844] B. Heiderhof, 'Die Berücksichtigung des Art. 3 Klauselrichtlinie bei der AGB-Kontrolle', *WM* 2003, p. 510.
[845] MunchKomm zum BGB/Wurmnest (2012), introduction to article 307, nr 11.
[846] W.H. van Boom, 'Algemene en bijzondere regelingen in het vermogensrecht', *RM Themis* 2003, p. 299-300.
[847] R. Zimmerman, *The new German law of obligations, Historical and comparative perspectives*, OUP: Oxford 2005, p. 201.
[848] See also below, par. 10.3.1.1. A similar sharp distinction, and similar debate on the development of private law in a code or in separate legislation, is not visible in Dutch private law.

maintain the coherence of "general" private law. Thus, the choice whether to implement the *acquis* within the BGB also depends on the question whether one finds that the *acquis* provides rules of general private law or whether one finds that they pursue "special" rules. It is not clear on what basis this distinction is made – the incorporation of a large range of Directives in the area of consumer contract law indicates that the origin of the Directive, and the aims of Directives do not set them apart as *Sonderprivatrecht*.

On the one hand, the incorporation of Directives into the BGB may be defended as especially Directive 99/44 on consumer sales contains rules that are a central part of national contract laws. Zimmerman[849] approves of the incorporation of consumer law into the BGB, as it concerns general contract law, and pursues an end similar to general contract law, i.e. protecting parties substantive freedom of choice when they enter into a contract. These rules may therefore be seen in the light of more general questions of private autonomy and *Fremdbestimmung* underpinning the BGB.[850] In particular, Zimmerman[851] finds that consumer contract law should not be based on 'loosely defined social concerns'.

On the other hand, the idea that consumer contract law established by the EU pursues general aims of contract law in a manner comparable to German private law is not self-evident. Rather, looking at the Directives reveals that the *acquis* hardly seems to be based on maintaining the balance between parties – instead, it seems to be based on loosely defined economic concerns, while the question whether general principles underpin the private law *acquis* is subject to debate.[852] In particular, principles of private autonomy and *Fremdbestimmung* were not discussed during the drafting of the Directive.

Thus, the reasoning of the German and Dutch legislator makes clear that national legislators are well aware of the need to deal with ongoing harmonisation. However, their reasons for implementing the *acquis* within codifications are not based on a clear, consistent strategy and the aims of codifications are stressed without considering whether the development of the *acquis* makes it more difficult to achieve these aims. In other words, national legislators adopt a defensive approach in the implementation of the *acquis* in codifications.

7.2.2. The use of codifications in areas of private law with a 'cross-border' aspect

Have legislators adequately recognised the development of European and international law, and the capability of the code to contribute to the consistent, accessible and predictable development of private law with an inherent cross-border aspect?

National legislators[853] are inclined to preserve codification even in areas that have an inherently transnational character and that have become increasingly harmonised, as is the case for international private law. Accordingly, the Dutch legislator has sought to codify this area in an additional book in the Dutch Civil Code. Similarly, the German legislator also opted for codification in the EGBGB.

►The German legislator has considered its approach to the development of private international law in the light of international and European initiatives.

[849] Zimmerman 2005, p. 224. Zimmerman noted that German academics were uncharacteristically divided on the *Schuldrechtsmodernisierung*. See for a different option for example W. Ernst, B. Gsell, 'Kaufrechtslinie und BGB', *ZIP* 2000, p. 1410. See especially critically W. Flume, 'Vom Beruf unserer Zeit zur Gesetzgebung', *ZIP* 2000, p. 1427 (on the implementation of Directive 97/7).
[850] See previously par. 4.5.1.1.
[851] Zimmerman 2005, p. 225.
[852] See further below, par. 10.5.2.
[853] S. Symeonides, 'Codification and flexibility in private international law', General reports to the XVIIIth Congress of the International Academy of Comparative Law/ Rapports, 2011, p. 5-10, with an extensive overview of the number of codifications of international private law, detects an international tendency for codification of international private law.

The German legislator codified private international law in articles 3 et seq EGBGB in 1986, as BVerfG case law necessitated reform of private international law.[854] Originally, there was debate whether the development of private international law should be left to international law, which was an argument against the inclusion of private international law in the BGB.[855] Kropholler[856] held that international law had improved the quality of German private international law, but also found that as internationalisation increased, the codification would increasingly be overshadowed and replaced by relevant treaties. If international law was applicable, Kropholler therefore preferred referral to international law to incorporation. The 1986 reform did not abolish private international law outside of the EGBGB that existed in separate laws, treaties and customary law.[857]

This restraint was reconsidered. Whereas, in the 1986 reform, future EU initiatives were a reason for the German legislator to abstain from providing rules in the area of non-contractual obligations,[858] the German legislator took a more active approach in the 1999 reform. The German legislator did provide rules for non-contractual obligations, notwithstanding simultaneous developments at the European level, apparently in an attempt to influence the future Regulation.[859] After Regulations Rome I and II, the German legislator, abandoned overlapping "national" private international law.[860] The German legislator did retain articles 40-42 EGBGB on non-contractual obligations as Regulation Rome II did not provide a sufficiently comprehensive regime to jusitfy abolishing these provisions. However, the scope of articles 40-42 EGBGB was considerably reduced by the Regulation.[861] Moreover, in the German legal order, concern on the lack of coherence between relevant Regulations (and possibly, treaties) have been raised.

►Thus, the difficulties in maintaining coherence at the national level when private international law is developed at the European or international level has been considered, and the legislative approach to future European initiatives has also been considered. This consideration may be beneficial for private international law as it has provided the European legislator with a set of rules that it may take as an example in drafting European initiatives.

►The Dutch legislator has not considered the possibility that the aims of codifications can be undermined by European or international initiatives, nor has it sought to influence European initiatives through reforming the law.

Accordingly, in 2001, the Dutch legislator provided private international law on non-contractual obligations, without referring to simultaneous European developments.[862] These rules were abandoned after Regulation Rome II was established, and the Dutch legislator extended the rules of the Regulation to cover areas falling outside its scope.[863]

Also, the Dutch legislator has emphasised the benefits of codification in the drafting of book 10. Particularly, the Dutch legislator maintains that the development of a code benefits

[854] See further Max Planck Institute, *RabelsZ* 1983, p. 595.
[855] O. Hartwieg, 'Der Gesetzgeber des EGBGB zwischen den Fronten heutiger Kollisionrechts-Theorien', *RabelsZ* 1978, p. 431.
[856] J. Kropholler, 'Der Einfluβ der Haager Ὗbereinkommen auf die deutshce IPR-Kodifikation', *RabelsZ* 1993, p. 222.
[857] Schulze/BGB/Dörner (2012), iontroduction to articles 3-6 EGBGB, nr 9-10.
[858] MunchKomm zum BGB/Junker (2010), introduction to article 38 EGBGB, nr 2.
[859] Comp. A. Spickhoff, 'Die Restkodifikation des Internationalen Privatrechts: Außervertragliches Schuldund Sachenrecht ', *NJW* 1999, p. 2214-2215, who notes that the 1999 reform took place in the light of European developments.
[860] BT-Drucks. 16/12104. It concerns in particular articles 27-37 EGBGB.
[861] MunchKomm zum BGB/Junker (2010), introduction to article 38 EGBGB, nr 38.
[862] *Kamerstukken II*, 26608, 2000-2001, nr. 3.
[863] *Kamerstukken II*, 2009-2010, 32137, nr 3, p. 87.

accessibility.[864] In the view of the Dutch legislator, the chance that national provisions may "gain" a European background[865] and ongoing harmonisation strengthens the need for a national codification of international private law.

However, relevant questions for the capability of codifciations to independently achieve accessibility, as well as predictability, consistency and responsiveness have not suffciently been recognised. Specifically, the question to what extent the national legislator can still offer a framework for international private law in the light of international and European initiatives has been debated in the Dutch legal order where Book 10 of the BW went into effect in 2012.[866] Codification cannot prevent the development of private international law alongside the code, which may necessitate further amendments to the code,[867] which may undermine the predictable development of private law in the code. Codification does also not ensure the consistent development of international private law at the European level. Additionally, as the territorial scope of codifications is limited to the territory of a state, it may be asked whether codifications are particularly suitable to deal with cross-border issues such as international private law.[868] Also, importantly, the aim of Book 10 to improve accessibility has already been undermined by the development of various Directives[869] that contain international private law provisions, which have been implemented in the various parts of the Civil Code[870] and other laws.[871] This is unlike the German approach, where article 46b EGBGB provides an overview of areas where particular conflict rules, following from Directives, apply.[872]

►Thus, the Dutch legislator has not sufficiently recognised interdependence, which has necessitated amendments in recently reformed laws, and the accessibility, predictability and consistency of private international law may be diminished.

7.2.3. Conclusion on the use of codifications

Have legislators taken into account that other actors also develop private law and have they accordingly interacted with these actors? How has their approach affected the extent to

[864] Similarly, M.V. Polak, 'Oppassen – inpassen – aanpassen. Taken en bevoegdheden van wetgever en rechter bij de receptie van internationaal en communautair IPR in de Nederlandse rechtsorde', in: C.A. Joustra, M.V. Polak, *Internationaal, communautair en nationaal IPR* (Mededelingen van de vereniging voor Internationaal Recht 2002), Asser Press: The Hague 2002, p. 95-96 argues that especially considering the fragmented nature of harmonised private international law, it might be beneficial for legal practice to oversee the rules in private international law in a particular subject, rather than categorising the different rules of private international law in accordance with the different actors issuing that particular set of rules.
[865] *Kamerstukken II*, 2009/10, 32 137, nr. 3, p. 4.
[866] H.U. Jessurun d'Oliveira, 'Is een codificatie van het Nederlandse IPR nog zinvol? Oftewel, geloven we nog in Boek 10?', *NTBR* 2005, p. 428, A.V.M. Struycken, 'Veelheid van rechtsbronnen: één IPR?', *AA* 1996, p. 68, remarks that the existence of multiple sources of international private law makes the formation of a codification of IPR more difficult ('De veelsoortigheid van rechtsbronnen is een gegeven dat de codificatie van het IPR bemoeilijkt.'), see also V. van den Eeckhout, 'Codificatie van het Nederlands ipr of het vastleggen van een nationaal navigatiesysteem voor internationale vliegroutes', *NTER* 2011, p. 10.
[867] Comp. for example the adaptation of article 6 par. 2 Directive 93/13 on unfair terms in consumer contracts, article 12 par. 2 Directive 97/7 on distance contracts. reformed by article 43 in the proposal for a Directive on consumer rights, COM (2008) 614 final or article 9 Directive 94/47 on timeshare, modified by article 12 par. 2 Directive 2008/122 on timeshare.
[868] Other objections that have been made is that codifications do not leave sufficient room for flexible, judicial development of international private law, while flexibility is necessary in international private law; however, the Dutch codification shows quite clearly that codifications may leave sufficient room for judicial development, at least at a national level. Whether this would also be true for codifications at another level may be doubted. Comp. also S. Symeonides, 'Codification and flexibility in private international law', General reports to the XVIIIth congress of the International Academy of Comparative Law/ Rapports, 2011.
[869] For example article 12 Directive 93/7 on the return of cultural objects, article 9 Directive 2002/47 on financial collateral arrangements, article 12 Directive 2002/65, or article 22 par 4 Directive 2008/48.
[870] See for example article 7:73, implementing article 22 par. 4 Directive 2008/48 on consumer credit, article 7:50i par. 3, implementing article 12 par. 2 Directive 2008/122 on timeshare. See critically on this approach V. Heutger, 'De toekomst van richtlijn 87/102 betreffende consumentenovereenkomsten', in: A.S. Hartkamp, C.H. Sieburgh, L.A.D. Keus (eds.), *De invloed van het Europese recht op het Nederlandse privaatrecht II*, Kluwer: Deventer 2007, p. 95.
[871] See for example article 1012 Wetboek van Burgerlijke Rechtsvordering, implementing article 12 Directive 93/7 on the return of cultural objects.
[872] See further MunchKomm zum BGB/Martiny (2012), article 46b EGBGB, nr 4 et seq.

which codifications increase predictability, accessibility, consistency and responsiveness of European private law?

Firstly, neither the German and Dutch legislator's choice for incorporation of the *acquis* within respectively the BGB and BW has been based on interaction with other actors; instead, in both legal orders, maintaining codifications played a large role. Interestingly, the approach of the German legislator can be contrasted with its previous approach towards implementation of the *acquis* in separate legislation. This change makes clear that even if the German legislator initially did not insist on incorporation, the harmonisation of central areas of private law makes it unattractive for legislators to implement the *acquis* outside the code. The Dutch legislator was much more focussed on retaining its codification that had just been established as the *acquis* began to develop. For both legislators, retaining the code has been a decisive reason to implement the *acquis* within the codification.

However, legislators in other legal orders do not necessarily share that opinion. If codes already distinguish between consumer codes and "general" codifications, implementation outside of the general code is more consistent with the existing approach to consumer law. In short, the choice how to implement the *acquis* depends not only on the strengths and weaknesses of a codification in the multievel legal order. Instead, the choice is predetermined by the way in which private law has developed within a legal order, and legislators will therefore primarily focus on their own legal order. Nevertheless, interaction with European actors and other legislators may be valuable as it may indicate whether legislators need to take further harmonisation initiatives into account. Alternatively, the experience of other actors with many separate laws, or with older codifications may indicate whether the development of separate legislation is necessarily problematic – depending on the approach of the judiciary and the existence of adequate handbooks – and in which ways the private law *acquis* can be implemented within codifications.

Secondly, the approach of the German and Dutch legislator towards the codification of private international law differs. The German legislator seems more inclined to interact with especially European actors, which is particularly visible in its 1999 initiative on private international law in non-contractual obligations. Notably, the 1999 initiative provided a set of rules that could serve as an example, which increases the chance that developments at the European level that are undesirable in the German view – in particular, inconsistencies between European rules and national law – are prevented or amended. Yet as more legislators opt for this approach, the influence of individual proposals may decline. Importantly, however, this approach does allow for thorough debate based on various options, which may contribute to the eventual outcome of debate, provided that actors are willing to accept compromises.

Yet the question arises whether German private international law is more comprehensible because the German legislator has interacted more. Notably, it has resulted in less amendments in newly established law than is the case in Dutch law, while the Regulation also showed less inconsistencies with German law.

The Dutch legislator has not similarly considered its approach to codification in the light of European and international initiatives, and has had to amend newly established law. Nevertheless, it is not apparent that Dutch law is less comprehensible than German law. Although it has taken a less active approach than the German legislator, the Dutch legislator does not fail to interact and it is hardly the only legislator to establish a code on private international law. Book 10 BW arguably is more accessible than German private international law, but the EGBGB provides a better overview of diverging rules following from the private law *acquis* and it is unlikely that inconsistencies between German and European law will

arise. Yet as considerable parts of book 10 directly refer to Regulation Rome I, the Dutch approach is also unlikely to lead to inconsistencies. The choice of the Dutch legislator to extend the scope of Rome II rather than maintain national provisions may moreover decrease the chance of future inconsistencies. However, as future European initiatives develop that differ from Rome II, inconsistencies may still arise.

In other areas, however, both the German[873] and the Dutch[874] legislator have anticipated Directives. In these cases, the Union may benefit from national experiences in the case of 'anticipated implementation'. If "implementation" precedes harmonisation, this may make visible how a Directive or Regulation works in practice.[875]

More generally, the development of the *acquis* and harmonisation and internationalisation in private international law make clear that increasing accessibility, consistency and the predictable development of private law within the framework provided by the code becomes more complicated in the multilevel legal order where multiple actors – not just the legislator involved in codification – develop binding private law.

These difficulties do not mean that codifications may not still contribute to accessibility, consistency and predictability, as well as private law's responsiveness to both legal practice and society's views on justice, especially because large parts of private law are still developed at the national level. However, if legislative competence is transferred to the European level, legislators have reasons to adopt a more active approach to harmonisation, in order to become aware of future initiatives for harmonisation and the corresponding need to adapt codes. Also, national state actors, if they participate in European legislative procedures, need to contribute to a consistent development of the *acquis*, as this will lessen the chance that they will subsequently have to implement inconsistent European measures.[876] European state actors should be equalkly aware of the need to develop the law in a more consistent manner. If national legislators take this approach, codifications may still improve accessibility. Moreover, European measures are less able to develop rules that are responsive to society's legal views on justice, as European actors are likely to be less aware of these views. It is therefore not surprising that the use of codification continues to be widespread and is also adopted by new European Member States. Thus, any hopes that civil law jurisdictions will come to consider codification as 'superfluous' and 'outmoded' may, fortunately, continue to be disappointed.[877]

[873] The German legislator anticipated the doorstep selling Directive. See further P. Gilles, 'Das Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften - Anmerkungen zum jüngsten Verbraucherschutzsondergesetz im Zivilrecht unter Berücksichtigung seines rechtspolitischen Gesamtkontextes', *NJW* 1986, p. 1135-1136.
[874] Originally, the Dutch legislator anticipated European initiatives for more stringent professional rules of conduct for auditors, in particular the suggestion for mandatory rotation of auditors, see COM (2011) 779/3 p. 8.This has however been postponed. Comp. the letter from the Minister of Finance of 7 December 2012, nr FM/2012/1856 M and *Kamerstukken I*, 2011-2012, 33025, nr J, stating that European legislation should only be anticipated if this is urgently necessary.
[875] Comp.
[876] Comp. J.M. Smits, 'The complexity of transnational law: Coherence and fragmentation of private law', *University of Helsinki Legal Studies Research Papers* 2011, p. 125.
[877] T. Weir, 'Difficulties in transposing Directives', *ZEuP* 2004, p. 614.

7.3. The use of soft laws

At the European level, various sets of soft law have developed that partially overlap.

This is especially the case for contract law, where soft law rules have been developed in the PECL, which has also been used as a basis in the development of the DCFR. Notably, a revised version of the PECL has developed,[878] as well as the UNIDROIT Principles. Furthermore, there is also the Draft for a European contract code, drafted by Prof. Gandolfi,[879] which shows considerable overlap with the PECL. The aims of these sets of soft law seem to overlap as well: they are to function as a toolbox, an optional regime that parties can apply to their contract, or they are to be used for the further development of private law at a European level, as well as academic debate and education on transnational or comparative European contract law. In addition, other projects such as the Trento common core project,[880] and the Ius commune casebooks[881] may serve these aims as well.

Against this background, this paragraph asks whether the drafters of soft law have taken into account that other actors develop private law, whether actors have interacted with each other, and how this approach has affected the extent to which soft laws improve the predictability, accessibility, consistency and responsiveness of European private law. This paragraph will pay particular attention to the DCFR because of its role in the reform of the private law *acquis* and the development of a proposal for a Common European Sales Law.

Paragraph 7.3.1. asks whether actors have considered the capability of soft law to contribute to a more comprehensible private law. Paragraph 7.3.2. will consider the development of overlapping sets of soft law and paragraph 7.3.3. will consider the development of the DCFR alongside the *acquis*. Paragraph 7.3.4. will end with a conclusion.

7.3.1. Soft laws modelled on national codifications

This paragraph asks whether the drafters of soft law have taken into account that soft laws are less able to effectively increase the predictability, consistency, accessibility and responsiveness of law and depend upon other actors for their success, and how the approach of actors has affected the comprehensibility of private law.

The difficulties that traditional codifications already have in safeguarding the predictability, consistency and responsiveness of private law indicate that soft laws may face even more difficulties in upholding predictability, consistency, accessibility and responsiveness. Nevertheless, the choice to model soft laws on successful codifications does not seem to have been given much thought. Instead, the choice of the drafters of soft law is in line with the widespread use of codifications throughout the European Union, and arguments for codification at the European level.[882] Thus, the drafters of the DCFR, established as an instrument to support the European legislator, felt that a codification was a "drafting" technique which had proven successful beyond other techniques.[883] The impression arises that the drafters have assumed that the use of codification will significantly

[878] Association de Henri Capitant des Amis de la Culture Juridique Française, Société de Législation Comparé (ed.), European contract law – Materials for a Common Frame of reference: Terminology, Guiding Principles, Model Rules, 2008
[879] G. Gandolfi, *Code européen des contracts/Avant-projet*, *Livre premier*, Milan: Giuffrè 2001.
[880] See further http://www.common-core.org/index.php?option=com_content&view=article&id=46&Itemid=34.
[881] See further http://www.casebooks.eu/casebooks/overview/.
[882] See for example the Resolution of the European Parliament of 6 May 1994, OJ C 205/518.
[883] C. von Bar, 'Coverage and structure of the Academic Frame of Reference', *ERCL* 2007, p. 354. Comp. also H. Coing, H. Honsell, 'Einleitung zum BGB', in: Staudinger, BGB, ed. 2011, introduction, nr.48, where the DCFR is characterised as a Civil Code, with the remarks that the EU legislator severely misjudges the importance of a Euroepan codification, and where the 'English' style of provisions in the DCR is criticised.

contribute to predictability, consistency and accessibility.[884] This "national" approach towards drafting soft law is not specific the DCFR, but is visible in other sets of soft laws as well. Similar to the DCFR, the soft law rules at both the European and the international level typically take a rather "national" approach to private law – which is especially visible in the Gandolfi code, which is inspired by the Italian Civil Code and a draft for an English contract Code. [885] Similarly, the UNIDROIT Principles have been characterised in this way. Michaels[886] even characterises the UNIDROIT Principles as a 'codification' that seeks to make private international law superfluous by providing a set of rules summarising the similarities between private laws:

> 'Ein Hauptziel für die Formuliering der PICC war ja gerade, die angebliche Unsicherheit des Kollisionrechts zu überwinden (….) Das Ziel der PICC is nicht, die Zahl der Vertragsrechtsordnungen zu erhöhen (was für echte Rechtswahlfreiheit gut wäre), sondern vielmehr, die bestehenden Vertragsrechtsordnungen auf einem gemeinsamen Kern zusammenzuführen.'

Other soft law rules, although not especially focussed on a particular national code,[887] similarly take black-letter rules in the form of model rules and definitions as a starting point, and seek to ""discover" similarities between divergent law in a manner reminiscent of the "discovery" of general principles.[888] Notably, this does not mean that sets of soft law reflect the "common law" of Europe: although parts of soft law do seek to discover common elements, other parts may be intended as an innovation.[889] This approach may also have its benefits: legislators familiar with codifications may choose to make use of soft law drafted in this form rather than projects on comparative private law.[890]

The question however arises whether soft laws contribute to benchmarks of predictability, consistency, accessibility and responsiveness in a manner similar to national codifications. In particular, the ongoing development of binding private law alongside the DCFR not only seems possible, but likely, which necessitates that the DCFR should take the existence of other sources of *binding* private law alongside the DCFR as a starting point. Notably, this characteristic may make effectively pursuing the accessibility of private law in the DCFR especially difficult. Moreover, the DCFR needs to take as a starting point that it depends upon other actors for its success: it needs to be consistently used by other actors, such as the European legislator and judiciary, which, in turn, may be an incentive for other actors, at the national level, to refer to it. If European actors perceive that the DCFR has a clearly added value, for example because it facilitates the use of consistent terminology within the *acquis*, because it provides insights in national problems that are important in the reform of the *acquis*, or because it draws attention to the need to clarify the relation between overlapping European measures, this makes it more likely that European actors will

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[884] Comp. M.W. Hesselink, 'The Common Frame of Reference as a source of European private law', *Tulane Law Review* 2009, p. 923: 'The DCFR will prove to be irresistible. It has all the characteristics of a civil code which are familiar to lawyers in Continental Europe and which intrigue English common lawyers.'
[885] R. Zimmerman, '"Wissenschaftliches Recht" am Beispiel (vor allem) des europäischen Vertragsrechts, *Max Planck Private Law Research Paper* 10/23, p. 11.
[886] R. Michaels, 'Umdenken für die UNIDROIT-Prinzipien. Vom Rechtswahlstatut zum Allgemeinen Teil des Transnationalen Vertragsrechts', *RabelsZ* 2009, p. 873-874.
[887] Comp. also HKK/Schmoeckels nr 81, who points out that initially soft laws did not aim for a system of the law of obligations but were, instead, limited to contract law.
[888] See further below, par. 7.5.2.1.
[889] Comp. for example with regard to the PECL J.M. Smits, 'The Principles of European Contract law and the harmonisation of private law in Europe', in: A. Vaquer (ed.), *La tercera parte de los principios de derecho contractual Europeo*, Tirant: Valencia 2005, p. 575-576.
[890] R. Michaels, 'Umdenken für die UNIDROIT-Prinzipien. Vom Rechtswahlstatut zum Allgemeinen Teil des Transnationalen Vertragsrechts', *RabelsZ* 2009, p. 879.

consistently refer to the DCFR. Moreover, as national judiciaries are starting to refer to the PECL,[891] the added value of the DCFR to the PECL should also be clear for these actors, providing them with an incentive to start referring to the DCFR rather than the PECL.

It may be concluded that the drafters of the DCFR did not sufficiently take into account the decreased ability of soft laws to contribute to more comprehensible private law. The drafters also did not sufficiently recognise that the success of soft law instruments depends on the use of soft law made by other actors, which in turn depends on the added value of those instruments for other actors. Because drafters have not recognised this interdependence, the added value of the DCFR to European private law, and to the quality of the *acquis*, may remain limited.

7.3.2. Overlapping sets of soft law

This paragraph will ask whether drafters of soft laws have sufficiently taken into account the existence of other sets of soft law and how this may affect the predictability, consistency, accessibility, and responsiveness of private law.

Typically, sets of soft law such as the DCFR, the PECL, the Gandolfi code and the UNIDROIT Principles are based on comparative research, and thus take the coexistence of national private laws as a starting point. However, these sets of soft law subsequently do not, equally typically, make clear how they relate to the *acquis* or to one another, which may be especially interesting when divergences become apparent.[892] This may in particular diminish the consistency and accessibility of private law:

Firstly, the coexistence of various sets of soft laws gives rise to doubts with regard to the added value of multiple sets of soft law, especially considering the overlap between the different sets of soft law rules. Vogenauer[893] has questioned whether the aims pursued by the DCFR could not also be fulfilled by the UNIDROIT principles, asking whether there is a need for another set of soft law rules, next to the UNIDROIT Principles and the PECL. The question arises whether soft law sets in fields where soft law has not already been established would be more successful. Accordingly, Loos[894] has suggested that rules on other contracts, such as service contracts, franchise contracts, and distribution contracts would have had more added value, as contract law on these topics diverges throughout the Union.

Secondly, questions of accessibility arise. Would the area of European contract law not be easier to overview if there were one set of soft law rules, or if the various soft law rules indicated how they relate to one another? Zimmerman[895] remarks that, although the coexistence of different sets of soft law may initially inhibit accessibility, comparison between the different sets reveals similarities and reflects current comparative law research. Differences between the sets of soft law can mainly be found in the details and may be overcome by further discussion. Yet the differences between the different sets of soft law

[891] D. Busch, 'The Principles of European Contract Law before the Supreme Court of The Netherlands', *ZEuP* 2008, p. 549 et seq,

[892] The Gandolfi code provides an interesting exception. E.H. Hondius, 'Towards a European Ius Commune: The current situation in other fields of private law', in: K. Boele-Woelki (ed.), *Perspectives for the unification and harmonisation of family law in Europe*, Intersentia: Antwerp 2003, p. 126 points out that the Gandolfi code initiates debate with the PECL and the ideas brought forward by the colleagues of Prof. Gandolfi.

[893] S. Vogenauer, 'Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, competition, or overkill of soft law?', *ERCL* 2010, p. 143.

[894] M.B.M. Loos, 'Scope and application of the Optional instrument', *CSECL Working Paper* 2011, p. 5.

[895] R. Zimmerman, '"Wissenschaftliches Recht" am Beispiel (vor allem) des europäischen Vertragsrechts, *Max Planck Private Law Research Paper* 10/23, p. 34-35: 'In der Regel dürfte sich dabei ein weitreichendes Maß an Übereinstimmung zeigen, das den gegenwärtigen Stand der rechtsvergleichenden Diskussion widerspiegelt. Die nach wie vor bestehenden Detailunterschiede sind präzise herauszuarbeiten und argumentativ zu überwinden.'

rules, as well as a lack of coordination, may give rise to confusion. This becomes apparent when considering, for example, the question how the DCFR, the revised versions of the PECL, as well as the proposed Common European Sales Law and the reformed Directives in the *acquis* relate to one another. It is a bit rash to conclude that the PECL has no further meaning now that it has served – along with other sources – as a basis for the DCFR.[896] Nevertheless, it also does not seem completely illogical if the focus shifts to the DCFR and especially the Optional Instrument, rather than the PECL.[897] On the other hand, practitioners and courts may be more aware of the PECL than of more recent initiatives, and in cases outside of the scope of the *acquis*, they may not find it problematic that the PECL are not also based on the private law *acquis*.[898] Practitioners and courts may also refer to the UNIDROIT Principles.[899]

Thus, interaction between the drafters of different sets of soft law might have formed a starting point for discussion, clarifying why rules in sets of soft law diverge, providing the European legislator with multiple soft laws and discussion on which rules in sets of soft law might serve as a source of inspiration for European legislation. Accordingly, European actors may be more inclined to make use of these sources if they make clear how they relate to the *acquis* and other measures, which may be improve accessibility.

7.3.3. Soft law(s) and the private law *acquis*

This paragraph will ask whether drafters of soft laws and drafters of the private law *acquis* have taken into account one another's initiatives and how that has affected the predictability, accessibility, consistency and responsiveness of both the private law *acquis* and soft laws.

The drafters of soft law have not consistently referred to the private law *acquis*.[900] Early sets of soft law, in particular the PECL, were developed before or during the development of the private law *acquis*, which was a reason for not including the *acquis*. Yet more modern versions have also not consistently referred to the private law *acquis*. In particular, the DCFR have taken the original version of the PECL, which did not take into account the private law *acquis*, as a starting point.[901] Even though it was initially suggested that the drafting of the DCFR and the development of Directive 2011/83 on consumer rights would be closely intertwined,[902] it was not clear which, if any, coordination took place between the drafting of the DCFR and the simultaneous reform of the *acquis*.[903]

However, not taking into account the private law *acquis* in the DCFR may be more problematic than was the case in earlier sets of soft law. Particularly, if drafters of more modern sets of soft law do not take into account the private law *acquis* and relevant case law, this may decrease the chance that legislators will follow these rules. For *modern* sets of soft law, not taking into account the private law *acquis* and relevant case law may be particularly

[896] R. Zimmerman, 'Textstufen in der modernen Entwicklung des europäischen privatrechts', *EuZW* 2009, p. 319.
[897] Comp. K. Riesenhuber, 'A competitive approach to EU contract law', *ERCL* 2011, p. 119.
[898] Comp. D. Busch, 'The Principles of European Contract Law before the Supreme Court of The Netherlands', *ZEuP* 2008, p. 549 et seq. See for the application of the PECL before the Spanish courts C. Vendrell Cervantes, 'The application of the Principles of European Contract Law by Spanish Courts', ZEuP 2008, p. 534.
[899] Comp. for example also *Proforce Recruit Limited/The Rugby Group Limited* (2006), EWCA Civ 69 (n. 57) *per Arden LJ*, at par. 57, who referred to the UNIDROIT Principles.
[900] See further for example H.-W. Micklitz, 'The Principles of European Contract Law and the protection of the weaker party', *Journal of Consumer Policy* 2004, p. 339.
[901] R. Zimmerman, 'Textstufen in der modernen Entwicklung des europäischen Privatrecht', *Europäisches Zeitschrift für Wirtschaftsrecht* 2009, p. 321.
[902] European Commission, *First annual progress report on European contract law and the acquis review*, COM (2005) 456, final p. 4.
[903] Ch. Twigg-Flesner, D. Metcalfe, 'The proposed consumer rights Directive – less haste, more thought?', *ERCL* 2011, p. 369-370.

problematic if soft law is to play a role in the further development of the private law *acquis*, in which case a lack of interaction may increase the chance of inconsistencies, inhibit the predictable development of the private law *acquis* and give rise to confusion.[904]

These potential problems become clear from various questions that can be raised from the future development of the DCFR and the private law *acquis*. Firstly, the drafters have occasionally diverged from existing European law,[905] which may lead one to wonder whether the DCFR will be used as a toolbox in the continuing reform of the consumer *acquis*, as well as the interpretation of the *acquis*.[906] The failure of the European legislator to consistently take the DCFR as a starting point in the (re)formation of the *acquis*[907] indicates otherwise and may be a reason for national legislators and judiciaries to not refer to the DCFR in the implementation and interpretation of the *acquis*, as such referral may lead to the incorrect implementation of European law. Similarly, one may wonder to what extent the DCFR will play a role in the further development of the proposal for a Regulation in a Common European Sales Law, which stipulates in article 1 that it will be developed autonomously, in accordance with the (few) principles underlying it and its aim to advance the internal market. Hesselink[908] states that the DCFR could still serve as a source of inspiration for amendment of the proposal. Notably, the legislator could be reconsidering its use of the DCFR; in Directive 2011/7 combating late payment, reference is made to the DCFR.[909]

Secondly, after the reform of the *acquis* that limited the level of consumer protection, reconsideration of the DCFR, which at various points provided a wider protection than the "old" Directives (which in turn allowed for more protection than the revised Directives) would seem a desirable exercise if the DCFR is still to fulfil a function as toolbox in the further development of the private law *acquis*. After all, it may be doubted whether actors would make use of a toolbox that provides for a level of protection inconsistent with the *acquis*.[910] More generally, inclusion of the consumer law *acquis* in the DCFR may also provide an opportunity to take the criticism on the DCFR into account, and discuss the role of the different sets of soft law. Notably, though, the DCFR has already – if not very often – been used in the development of the *acquis*, and the question arises whether such reform would be necessary.

Additionally, what consequences would reconsideration of the DCFR have? Possibly, a re-examination might not lead to the provision of different rules, if the revised DCFR is to be used as a toolbox. At most, a critical examination could indicate a need for reform – yet it may not be desirable to initiate more reform after the *acquis* has already been reformed, as ongoing reform may limit not only the accessibility of the *acquis*, but also the predictable and consistent development of the private law *acquis*. Also, *if* the DCFR should reflect the consumer law *acquis* more, when should that take place - before the reform of Directive

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[904] W. Devroe, 'Impact van door het Europees Hof van Justitie ontwikkelde algemene beginselen op privaatrechtelijke verhoudingen', in: A.S. Hartkamp, C.H. Sieburgh, L.A.D. Keus (eds.), De *invloed van het Europese recht op het Nederlandse privaatrecht I*, Kluwer: Deventer 2007, p. 188.

[905] R. Zimmerman, 'Europäisches Privatrecht – Irrungen, Wirtungen', *Max Planck Private Law Research Paper* 2011, p. 9, notes that the drafters of the PECL and UNIDROIT may also have chosen to not include the acquis because of unhappiness with the quality of the private law *acquis*. M.W. Hesselink, 'The Principles of European Contract Law: Some choices made by the Lando Commission', in: M.W. Hesselink, G. de Vries (eds.), *Principles of European Contract Law, Preadviezen uitgebracht voor de Vereniging van Burgerlijk Recht*, Kluwer: Deventer p. 11, states that the improvement of fragmented and inconsistent state of the *acquis* was also considered by the drafters of the PECL.

[906] See further below, par. 10.7.2 and par. 11.7.2.

[907] Comp. M.W. Hesselink, 'The Consumer Rights Directive and the CFR – Two worlds apart?', *ERCL* 2009, p. 290-303.

[908] M.W. Hesselink, 'The consumer rights Directive and the DCFR: Two worlds apart?', *ERCL* 2009, p. 297-302.

[909] See for example consideration 28 in the preamble of Directive 2011/7 combating late payment.

[910] However, that does not mean that lowering the level of consumer protection would be a good move- rather it would ideally prompt a reconsideration of especially full "targeted" harmonisation, comp. M.W. Hesselink, 'The consumer rights Directive and the DCFR: Two worlds apart?', *ERCL* 2009, p. 297

90/314 has been finished? On the one hand, if the review of the package travel takes a long time, it may benefit from a revised DCFR. On the other hand, the review of the package travel Directive may also be held up the revision process. Unfortunately, it is difficult to predict how long the reform of this Directive will take.

It may be concluded that drafters of especially the DCFR as well as European actors have insufficiently made clear how the rules in soft law will be used in the development of the private law *acquis* and how soft laws will cope with changes in the private law *acquis*. Consequently, the role of the DCFR in the reform of the *acquis* is not clear, which inhibits the predictable development of the private law *acquis* and increases the chance of inconsistencies, especially if the European legislator uses the DCFR inconsistently.

7.3.4. Conclusion on the use of soft laws

Have the drafters of soft law have taken into account dependence on state actors and have actors accordingly interacted with each other, and how has this approach affected the extent to which shoft laws have enhanced the predictability, accessibility, consistency and responsiveness of European private law?

Firstly, the choice for soft law in the form of codifications has not been given much thought, and consequently the limited capability of soft law codifications to safeguard the predictability, consistency, accessibility and responsiveness of private law is overlooked. Because actors have insufficiently recognised dependence on other actors making use of soft law, the accessibility of private law may be lessened. Also, the lack of interaction and debate on the different provisions are a missed opportunity to provide the European legislator – for whom the DCFR was drafted – with a more elaborately discussed set of rules that can serve as an inspiration for the development of the *acquis*.

Possibly, drafters, if they had wished to maintain the codification technique, could have considered the additional use of techniques to compensate for potential weaknesses arising from the use of codification, especially techniques that might have a chance to successfully further the consistent, accessible, and predictable development of the *acquis*, for example the development of databases and networks.[911]

Secondly, more interaction between drafters of sets of soft law and state actors may provide more clarity on relation between the different sets of soft law, and provide starting points for reform or debate. In that way, current inconsistencies may make clear that a particular subject is controversial and provide alternative models for solutions, so that the added value of different sets of soft law is more visible.

Thirdly, both European actors and the drafters of especially the DCFR have not satisfactorily indicated how the DCFR relates to the *acquis*, how it would cope with developments and changes in the *acquis* and how it would be used in the reform in the *acquis*. This has given rise to confusion on the development of the *acquis* and the role of the DCFR, which decreases the stable and consistent development of private law.

[911] See further par. 8.2.3. and 8.2.4. Especially the use of databases on case law and literature on the further – legislative or judicial – development could provide a valuable source of information, showing, for example, when the DCFR was or was not followed, or how a particular term has been interpreted.

7.4. The use of blanket clauses in a multilevel legal order

Have actors adequately considered that other actors develop private law and adequately interacted with one another, and how has that affected the extent to which blanket clauses improve the predictability, consistency, accessibility and responsiveness of European private law?

Paragraph 7.4.1. will consider the reasoning of the European and national legislators for using blanket clauses in the private law *acquis*, and par. 7.4.2 will consider the interaction between courts in the interpretation of blanket clauses in the private law *acquis*. Paragraph 7.4.3. will end with a conclusion.

7.4.1. Blanket clauses: furthering the responsiveness of European private law?

This paragraph will ask for what reasons legislators at the national and European level have used blanket clauses ('*open normen*', '*Generalklauseln*') and consider whether, in this reasoning, legislators have sufficiently considered the coexistence of actors, and how this has affected the quality of European private law.

National legislators frequently use blanket clauses to provide for some leeway in national laws, and allow the national judiciary some room for reaching a just outcome in individual cases.[912] Thus, the use of blanket clauses benefits the responsiveness of private law, both to business practices and to society's legal views on justice. Similarly, at the European level, the use of blanket clauses has been considered as hard to avoid, if the private law *acquis* is to deal adequately with future developments, thereby aiming to ensure that the law is also responsive to future practice.[913] Also, the private law *acquis* frequently uses blanket clauses to allow judges to reach a just outcome. Accordingly, consideration 16 in the preamble to Directive 93/13 on unfair contract terms holds that the assessment of the fairness of contract terms in consumer contracts 'must be supplemented by a means of making an overall evaluation of the different interests involved; (…) this constitutes the requirement of good faith'. Thus, European blanket clauses should also contribute to the responsiveness of private law to society's legal views on justice. The inclusion of this clause was originally supported by national legislators.

Several difficulties however become apparent when blanket clauses at a European level seek to increase responsiveness. Firstly, the inclusion of blanket clauses may entail that the CJEU is competent to interpret – but not apply – these blanket clauses. Mak[914] notes that the CJEU is not meant to balance the interest of parties to a dispute, and 'lacks sufficient insight in the social and economic make-up of individual Member States to assess which outcome would be appropriate in individual cases'. Wissink [915] points out that the interpretation of blanket clauses may depend upon factual circumstances, which might, in

[912] A.S. Hartkamp, 'Judicial discretion under the New Civil Code of The Netherlands', *American Journal of Comparative Law* 1992, p. 569, W.-H. Roth, 'Generalklauseln im Europäischen Privatrecht', in: J. Basedow, K.J. Hopt, H. Kötz (eds.), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag*, Mohr: Tübingen, 1998, p. 140 on the functions of blanket clauses.
[913] See T.C. Hartley, 'Five forms of uncertainty in European Community Law', *Cambridge Law Journal* 1996, p. 265-288.
[914] V. Mak, 'Harmonisation through "Directive-related" and "cross-Directive" interpretation: The role of the CJEU in the development in European consumer law', *TICOM Working Paper* 2008, p. 12, similarly Ch. Schmid, 'The CJEU as a constitutional and a private law court: A methodological comparison', *ZERP Diskussionspaper* 2006, p.12, comp. also H. Collins, *The European Civil Code: The way forward*, CUP: Cambridge 2008, p. 51-61. Comp. also critically H. Koziol, 'Die Glanz und Elend der deutschen ', *AcP* 2012, p. 59.
[915] W.H. Wissink, *Richtlijnconforme interpretatie van burgerlijk recht* (PhD thesis Leiden), Kluwer: Deventer 2001, p. 372. Comp. M. Schillig, Konkretisierungskompetenz und Konkretisierungsmethoden im Europäischen Privatrecht, De Gruyter: Berlin 2009, p. 155-156. See also S. Whittaker, 'Assessing the fairness of contract terms: The parties' "essential bargain", its regulatory context and the significance of the requirement of good faith ', *ZEuP* 2004, p. 75-98.

combination with the increased workload of the CJEU, be a reason for the CJEU to give some leeway to national judges. Roth[916] holds that the duty to act in good faith may, for example, concern the limitation of the exercise of rights as recognised in national law. In those cases, it is especially necessary to take national private laws into account. Thus, the inclusion of blanket clauses in the acquis and potential corresponding competence of the CJEU may not be a good way to contribute to the responsiveness of the private law *acquis*.

Secondly, it can be questioned to what extent European blanket clauses allow for responsiveness to legal practice. To the contrary, it seems as if blanket clauses, especially when combined with maximum harmonisation, may lead to outdated law, as it may severely limit the ability of other actors than the European legislator to respond to developing legal practices. The flexibility provided by national blanket clauses is also difficult to attain at a European level, especially if Union law strives for maximum harmonisation. At the European level, the development and adaptation of the private law *acquis* takes place at a rather slow pace, if only because of the necessity to reach political consensus between 27 Member States. Consequently, maximum harmonisation petrifies parts of national private law, leaving further development to the European level.

Thirdly, it may be asked whether legislators have sufficiently taken into account the weaknesses of blanket clauses if they are used in a multilevel legal order. Particularly, the use of blanket clauses also entails disadvantages in the form of inconsistencies, both at a national level and a European level.

The use of blanket clauses in the private law *acquis* that are identical to national blanket clauses may give rise to inconsistencies. This is also recognised at the European level, where the wording of those blanket clauses places the legislator before a difficult choice: whether to use new terms or to use ones that are identical to national blanket clauses that already have a particular meaning in national private laws. Dannemann, Ferreri and Graziadei[917] point out that to some extent, the use of existing terms, including blanket clauses, is inevitable. Inventing new terms at a European level may also cause misunderstanding, lead to various interpretations of the same concept, and undermine harmonisation as well as predictability. They point out that the *Joint practical guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions*[918] recommends a restrictive use of terms that carry a specific meaning in national laws, which is visible in some of the private law *acquis* – for example Directive 99/44 referring to 'guarantee' instead of 'warranty'. However, in some cases, the private law *acquis* still makes use of concepts also known in national laws, such as good faith.

Yet this may result in the insertion of a blanket clause into national law that already exists in national private law, but that has to be interpreted differently. Consequently, two seemingly identical concepts with divergent interpretations coexist – one concept in national general contract law and one originally European concept that has to be implemented in national law, which seems an undesirable development. Roth[919] has pointed out that this is especially problematic if a European blanket clause is implemented within a Civil Code, as this practice may lead to existence of '*Begriffsinseln*' as well as '*Begriffsspaltungen*', where identical concepts within the Civil Code have a divergent meaning.

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[916] W.-H. Roth, 'Generalklauseln im Europäischen Privatrecht', in: J. Basedow, K.J. Hopt, H. Kötz (eds.), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag*, Mohr: Tübingen, 1998, p. 140.
[917] G. Dannemann, S. Ferreri, M. Graziadei, 'Language and terminology', in: Ch. Twigg-Flesner (ed.), *The Cambridge companion to European Union private law*, CUP: Cambridge 2010, p. 78-79.
[918] Point 5 of the Guide, available at http://eur-lex.europa.eu/en/techleg/pdf/en.pdf.
[919] W.-H. Roth, 'Europäischer Verbraucherschutz und BGB', *JZ* 2001, p. 482.

Fourthly, the use of blanket clauses may also lead to inconsistencies within the private law *acquis*. Notably, the interpretation of identical or similar blanket clauses in the private law *acquis* may well diverge. This may be the result of nationally coloured interpretation or of divergent interpretation of identical or similar blanket clauses at a European level.

Fifthly, inconsistencies within the private law *acquis* may also arise from divergent interpretation of blanket clauses at the European level. Pavillon[920] convincingly argues that the interpretation of unfair contract terms may diverge from the interpretation of unfair commercial practices, pointing out that, for example, a contract term that is unfair under Directive 93/13 may not constitute an unfair commercial practice in the sense of Directive 2005/29 if the seller has drafted a transparent terms and complied with his information duties. Conversely, as Pavillon points out, a contract term that is not necessarily unfair may constitute an unfair commercial practice if it is ambiguously drafted and the seller has not complied with information duties. Yet the interpretation of these concepts may also diverge because the degree of harmonisation and the aim that Directives pursue differ.[921]

The divergent interpretation of blanket clauses and key concepts in the *acquis* is visible more generally throughout the *acquis*.[922] Although the differences in interpretation do not benefit the consistency and predictability of Union law, divergent interpretation follows logically from the character of Union law, which develops private law for varying purposes. Notably, the coexistence of divergent aims is not necessarily problematic from the perspective of Union law. Yet the importance of a coherent interpretation of the consumer law *acquis* has recently been emphasised by AG Trstenjak in her advice before Pereničová and Perenič v SOS. [923] A.G. Trstenjak emphasised the importance of a coherent interpretation of unfair contracts terms in the sense of Directive 93/13 on unfair contract terms and unfair commercial practices in the sense of Directive 2005/29 on unfair commercial practices in the consumer law *acquis*.

Unfortunately, it does not appear as if legislators have foreseen the difficulties that may arise from the use of blanket clauses, especially problems arising if European blanket clauses closely resembled blanket clauses that play a central role in national private law. The potential difficulties have however become apparent as problems with regard to responsiveness and inconsistencies have arisen.Consequently, the extent to which blanket clauses in the *acquis* may contribute to the responsiveness of private law is limited.

7.4.2. Interaction between courts in the interpretation of blanket clauses

This paragraph will consider whether courts have sufficiently interacted with one another and how that has affected the extent to which blanket clause contribute to predictability, consistency, accessibility and responsiveness of private law.

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[920] C.M.D.S. Pavillon, *Open normen in het Europees consumentenrecht, De oneerlijkheidsnorm in vergelijkend perspectief* (PhD thesis Groningen), Kluwer: Deventer 2011, p. 516-517.

[921] C.M.D.S. Pavillon, *Open normen in het Europees consumentenrecht, De oneerlijkheidsnorm in vergelijkend perspectief* (PhD thesis Groningen), Kluwer: Deventer 2011, p. 518.

[922] See for example W. van Gerven, 'The CJEU case law as a means for the unification of private law?', in: A.S. Hartkamp, E.H. Hondius (eds.), *Towards a European Civil Code?*, Ars Aequi Libri: Nijmegen 2004, p. 118-120, P. Rott, 'What is the role of the CJEU in EC private law? – A comment on the CJEU judgments in Océano Grupo, Freiburger Kommunalbauten, Leitner and Veedfald', 1 *Hanse LR* 2005, p. 14 notes that the CJEU 'has not developed a clear line between cases where it exercised deference and cases where it made a final decision'.

[923] Conclusion of A.G. Trstenjak of 29 November 2011 in case C-453/10 (Pereničová and Perenič v SOS), par. 90-92. Notably, the A.G. refers to a coherent interpretation, but mainly refers to the importance of preventing contradictory – thus inconsistent – judgments.

Similar blanket clauses have been used in the BGB, BW and the private law *acquis*, and accordingly, interaction should takes place between the CJEU and national courts:

1) Courts need to clarify the allocation of competences to interpret blanket clauses in the private law *acquis*

Currently, the question which courts are competent to interpret the blanket clauses in the private law *acquis* has given rise to debate. Roth[924] holds that blanket clauses intend to leave discretion to national legislators, in conformity with the general character of a Directive that is binding with regard to the results to be achieved, but not the techniques. Alternatively, Schillig,[925] Remien,[926] Micklitz,[927] and Wolff[928] find that the competence of the CJEU depends on the aim and the degree of harmonisation that a Directive pursues, as well as relevant national private law. Yet another view is taken by Basedow,[929] who points out that blanket clauses are concepts of Union law and therefore need to be interpreted autonomously by the CJEU, even if these clauses are incorporated in minimum harmonisation Directives. Yet it can be doubted whether the interpretation of blanket clauses at the European level would contribute to responsiveness.

Unfortunately, CJEU case law does not take a consistent approach to the interpretation of blanket clauses in the private law *acquis*, as rightly criticised by Schmid[930] and Collins.[931] Consequently, an answer to questions on the competence of the CJEU to interpret blanket clauses cannot be deduced from CJEU case law.

In turn, the lack of clarity on this point may undermine the consistent interpretation of blanket clauses throughout the *acquis*, as national courts assume that they have remained competent to interpret blanket clauses that have not changed on the surface, but that have gained a European background. Competence of the CJEU could inhibit the responsiveness of the private law *acquis*, and have consequences for the interpretation of the law that parties have not foreseen, thus limiting predictability. Also, national courts are less able to preserve the consistent development of the law if they are not competent to interpret blanket clauses. Therefore, this point should be addressed.

2) If blanket clauses are to be interpreted in accordance with European law, national courts have to take this into account and interact with the CJEU accordingly.

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[924] W.-H. Roth, 'Generalklauseln im Europäischen Privatrecht', in: J. Basedow, K.J. Hopt, H. Kötz (eds.), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag*, Mohr: Tübingen, 1998, p. 141. Comp. also C.-W. Canaris, 'Der EuGH als zukünftige privatrechtliche Superrevisionsinstanz?', *Europäische Zeitschrift für Wirtschaftsrecht* 1994, p. 417.

[925] M. Schillig, *Konkretisierungskompetenz und Konkretisierungsmethoden im Europäischen Privatrecht*, De Gruyter Recht: Berlin 2009, p. 226 et seq, K. Gutman, *The constitutionality of European contract law*, Leuven 2010, p. 81, also refers to the approach adopted by Directives. She notes that the Court cannot remedy ongoing divergence of national private law if Directives pursue minimum harmonisation.

[926] O. Remien, 'Die Vorlagepflicht bei Auslegung unbestimmter Rechtsbegriffe', *RabelsZ* 2002, p. 528-529.

[927] H.-W. Micklitz, 'The targeted full harmonisation approach: Looking behind the curtain', in: G. Howells, R. Schulze (eds.), *Modernising and harmonising consumer contract law*, Sellier: Munich 2009, p. 59-60.

[928] I. Wolff, *Die Verteilung der Konkretisierungskompetenz für Generalklauseln in privatrechtsgestaltenden Richtlinien* (PhD thesis Bonn), Nomos: Baden Baden 2002, p. 61-62, and specifically on several Directives in the private law *acquis* p. 201-250. Wolff, at p. 179 et seq argues that, considering the principle of proportionality, there is an assumption that the national judiciary retains some competence in the harmonisation of blanket clauses in the *acquis*.

[929] J. Basedow, 'Der Bundesgerichtshof, seine Rechtsanwälte und die Verantwortung für das europäische Privatrecht', in: G. Pfeiffer, J. Kummer, S. Scheuch (eds.), *Festschrift für Hans Erich Brandner zum 70. Gerburtstag*, Schmidt: Köln 1996, p. 675. See also for a uniform interpretation by the CJEU M.W. Hesselink, 'Case: CJEU- Freiburger Kommunalbauten v Hofstetter', *ERCL* 2006, p. 374-375, and also I. Klauer, 'General clauses in European private law and "stricter" national standards', *ERPL* 2000, p. 187-210.

[930] Ch. Schmid, 'The CJEU as a constitutional and a private law court: A methodological comparison', *ZERP Diskussionspaper* 2006, p. 15-16.

[931] H. Collins, *The European Civil Code: The way forward*, CUP: Cambridge 2008, p. 60.

National legislators appear to have overlooked the possibility that the use of blanket clauses at a European level also means that these blanket clauses should be interpreted in accordance with European law.[932] A similar tendency from the national judiciary can be discerned: currently, blanket clauses in the *acquis*, especially if they closely resemble national blanket clauses, may become 'nationalised' if the national judiciary would interpret European blanket clauses in conformity with national law. Wissink[933] holds that the interpretation of implementation law is affected by national law, and warns that judges should not just assume that the interpretation of European law and national law will converge. This sort of interpretation would undermine harmonisation.[934]

3) Interaction between national courts and the CJEU is also essential as the CJEU depends on national courts to refer relevant cases to the CJEU.

Currently, it may take some time before questions on the interpretation of blanket clauses come before the CJEU, as national judges may show some restraint in referring questions on the interpretation of blanket clauses to the CJEU.[935]

As a result, blanket clauses may leave actors acting contrary to 'good faith' better off than actors violating a more clearly delineated rule forbidding specific behaviour.[936] The Law Commissions[937] have pointed out that ambiguous terms leave room for argument on the duties of contract parties, which may not necessarily be beneficial for the weaker party without expertise or resources to spend on this argument.

4) Regardless of he question whether this is desirable, *if* blanket clauses in the *acquis* are to be interpreted in a similar manner throughout the Union, this also necessitates interaction between national courts.

Comparative research on the interpretation of blanket clauses in the *acquis* however indicates that currently, national supreme courts do not generally seem to have made it a practice to refer to foreign decisions in the interpretation of implemented private law.

►It can be concluded that courts in the interpretation of blanket clauses in the private law *acquis* do not sufficiently interact with one another, which may inhibit the predictability, consistency and accessibility of private law, as a lack of interaction leads to fewer CJEU decisions. Also, competence of the CJEU should be clarified, as this may affect the interpretation of blanket clauses, which should be foreseeable. Moreover, the competence of

[932] Comp. recently T. Ritter, 'Europarechtsneutralität mitgliedstaatlicher Generalklauseln?', *NJW* 2012, p. 1549.
[933] M.H. Wissink, *Richtlijnconforme interpretatie in het burgerlijk recht*, 2001, 372-374, referring to HR 10 January 1992, *NJ* 1992, 576 (Jehro/Brinkhaus), par. 4.4 where the *Hoge Raad* holds that the law on self-employed commercial agents has remained the same after implementation of Directive 86/653.
[934] P. Rott, 'What is the role of the CJEU in EC private law? – A comment on the CJEU judgments in Océano Grupo, Freiburger Kommunalbauten, Leitner and Veedfald', 1 *Hanse LR* 2005, p. 6 notes that, notwithstanding the principle of autonomous interpretation and consistent interpretation, national courts may tend to strive for application of Directives that is consistent with 'pre-harmonisation' case law.
[935] L. Niglia, 'The non-Europeanisation of private law', *ERPL* 2001, p. 575-599, even finds that national courts do not take note of the private law *acquis* when ruling on private law. See on the practice of the *Hoge Raad* with regard to international private law M.V. Polak, 'Spreken is zilver, zwijgen is goud', in: A.G. Castermans et al (eds.), *Het zwijgen van de Hoge Raad*, p. 89-114. See on the practice of the German *Bundesgerichtshof*, J. Basedow 'Der Europäische gerichtshof und die Klauselrichtlinie 93/13 – Der verweigerte Dialog', in: FS für Günter Hirsch zum 65. Geburtstag, 2008,
[936] E.S. van Nimwegen, 'Handhaving door de Consumentenautoriteit: een goed samenspel met het Burgerlijk Wetboek en Europese regelgeving?', *Contracteren* 2010, p. 57.
[937] Law Commission, the Scottish Law Commission, *An optional Common European Sales Law: Advantages and problems, Advice to the UK Government*, 10 November 2011, available at http://www.justice.gov.uk/lawcommission/docs/Common_European_Sales_Law_Advice.pdf, p. viii, x.

the CJEU may lessen national; courts' possibilities to interpret blanket clauses responsively and consistently with surrounding naitonal private law. Also, inconsistent decisions throughout the Union may undermine harmonisation, while they will also not contribute to the accessibility of the private law *acquis*.

7.4.3. Conclusion on the use of blanket clauses

These paragraphs have asked whether actors have adequately considered that other actors develop private law and adequately interacted with one another, and how that has affected the extent to which blanket clauses improve the predictability, consistency, accessibility and responsiveness of European private law?

Firstly, although both the national and European legislator have aimed to increase the responsiveness of private law in the use of blanket clauses, actors seem to have been insufficiently aware of potential problems that can arise from the use of these techniques. In particular, the dependence of European actors for a responsive interpretation of blanket clauses has been overlooked. Conversely, the dependence of national actors on European actors for a consistent development of the law through blanket clauses has not sufficiently been considered.

Secondly, both at the national and European level, courts have shown restraint in interacting with one another, which has not contributed to the predictability, consistency, and accessibility of the private law *acquis*.

Importantly, however, national courts may have good reasons for their restraint:

i) Referring cases to the CJEU may be a lengthy procedure and it is not self-evident to make use of this possibility in apparently straightforward cases.

ii) National supreme courts generally also have the task to ensure legal unity, and frequently referring to the CJEU may not be in line with that task, especially if it is not clear what decision the CJEU will take, whether that decision is likely to be in line with other relevant national private law, and whether the decision of the CJEU will contribute to the consistency of the private law *acquis*.

Furthermore, national courts may also exercise some restraint in referring to foreign decisions that may not always be available and accessible for national courts. Foreign decisions are usually taken in accordance with foreign law, and foreign decisions may diverge from national decisions, which may lead to inconsistencies.

Thus, although the lack of interaction between courts may undermine consistency and predictability, it may also have some disadvantages. Notably, more clarity on future CJEU decision, which presupposes more interaction between the CJEU and national courts, and more understanding for the different tasks of the CJEU and national courts, would enhance predictability.

7.5. The use of general principles

This paragraph will ask whether general principles contribute to the development of a more comprehensible European private law. It is submitted that the use of general principles is not necessarily based on interaction, but instead, on converging basic ideas on justice that may allow for multiple outcomes.[938] As such, general principles may provide a starting point for interaction between actors. Accordingly, this paragraph asks whether general principles are used as a starting point for interaction, and whether the use of general principles may give rise to potential problems that justify carefully considering the use of general principles, and how that has affected the predictability, accessibility, consistency and responsiveness of European private law.

It may be counter-intuitive to consider the "use" of general principles, as this may denote the "use" of ideas on justice. However, general principles are "used" in the reasoning of the courts, or in the development of codes on the basis of not only abstract ideas on justice , but also general rules or concepts deduced from specific rules. Moreover, especially at the European level, the idea of "using" private law, including ideas of justice, to promote the aims of the Treaties, is less unfamiliar than may the case at the national level.

Paragraph 7.5.1. will consider whether general principles contribute to the interaction between actors in the multilevel legal order by providing a starting point for discussion. Paragraph 7.5.2. will turn to the weaknesses that become apparent when considering the "use" of general principles. Paragraph 7.5.3 will end with a conclusion.

7.5.1. Interaction on the basis of general principles?

Have actors used principles, and for what reasons? Have principles served as a starting point for interaction?

The European legislator, in article 340 TFEU, already recognised that the contractual liability of the Union is determined by common principles. Already in AM&S/Commission,[939] the CJEU recognised the relevance of principles common to Member States and has since then repeatedly referred to common principles in some of its leading cases. Thus, in Francovich,[940] the CJEU referred to the principle of equal treatment. Later decisions have also recognised principles common to Member States.[941] However, the CJEU may not always find that a decision can be derived from common principles, but instead emphasise the aim of European measures or take the wording of European measures as a starting point for interpretation. Thus, in the interpretation of article 3 Directive 93/13, the CJEU has, instead of referring to common principles, emphasised the aim of the Directive. Accordingly, in *Freiburger Kommunalbauten*,[942] the Court emphasised that '[a]rticle 3 of the Directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated', and did not refer to principles common to the Member States.

[938] Accordingly, this research will consider general principles as ideas on justice, such as legal equality,iIn accordance with the definition of the Study Group on Social Justice in European Private Law, 'Social justice in European contract law: A manifesto', *ELJ* 2004, p. 656. A. Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht*, Mohr Siebeck: Tübingen 2009, p. 35, uses a broader definition as he considers the inductive process leading to the discovery of general principles as a defining characteristic.

[939] CJEU 18 May 1982 (AM & S v Commission), C 155/79, [1982] ECR, p. I-1575, par. 18.

[940] CJEU 9 November 1995 (Francovich v Italian Republic), C- 479/93, [1995], p. I-3843, par. 23.

[941] See for example CJEU 3 December 1974 (van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid), , [1974], p. 1299, par. 12-14, more recently CJEU 10 April 2008 (Hamilton v Volksbank Filder), C-412/06. [2008], p. I-2383, par. 42.

[942] CJEU 1 April 2004 (Freiburger Kommunalbauten v Hofstetter), C-237/02, [2004] ECR, p. I-3403, par. 19, see more recently also CJEU 26 April 2012 (Hatóság v Invitel),C-472/10, [2012] ECR, p. I-o.

National courts have also recognised the added value of general principles in soft laws,[943] although restraint in referring to these principles is also visible in for example the Dutch legal order.[944]

Typically, general principles may contribute to a more comprehensible private law in various ways. General principles are typically primarily used to improve the coherence of European private law, either filling in lacunas in the law, as a weighty argument in the interpretation of law, or in the evaluation of laws,[945] which may enhance the consistent development of law. Moreover, deducing general principles from private law may provide starting points to determine the future development of private law, which may contribute to the predictable development of private law. Furthermore, principles can also play an important role in furthering the responsiveness of European private law to society's ideas on justice.

Arguably, the added value of general principles in the multilevel legal order is also their role in providing starting points for debate.[946] Soft laws such as the PECL may also serve as a starting point for debate. Hesselink[947] finds that establishing 'neutral' language that could be used in debate, whether on comparative law or on the unification of private laws, is one of the most important benefits of the PECL. In this view, the 'neutral' language provided by the PECL facilitates identifying the various divergences and converges between the different national laws in the European Union, as differences in legal terminology may either cover up divergences or give the false impression of similarities. According to Mak,[948] by recognising general principles instead of imposing one solution, the CJEU could provide some leeway for states in the implementation of the *acquis* and increase the acceptability of the *acquis* in states. In this view, general ideas on justice (for example: equality) are common to Member States and the Union, but further interpretation and application of these principles are left to the national level. Such leeway may also prevent that private law eventually becomes outdated, as national judges are given some room for coping with new developments in legal practice.

7.5.2. Weaknesses arising from the use of general principles?

This paragraph will ask whether the use of general principles may give rise to problems that justify carefully assessing the benefits and detriments of general principles before promoting their increased use.

This paragraph will subsequently discuss unpredictability in paragraph 7.5.2.1. Subsequently, paragraph 7.5.2.2. will address problems of inaccessibility. Paragraph 7.5.2.3. will end with a conclusion.

7.5.2.1. The 'discovery' of general principles and predictability

[943] See above, par. 7.3.2. on the use of soft law made by national courts.
[944] See for examples J.M. Smits, E.A.G. van schagen , 'De Hoge Raad las Europese rechter: Mag het ietsje meer zijn?', in: A.G. castermans et al (eds*.), Het zwijgen van de Hoge Raad*, BWKJ 25, Kluwer: Deventer 2009, p. 84.
[945] Comp. A.S. Hartkamp, 'De algemene beginselen van het Unierecht en het privaatrecht', *WPNR* 6901 (2011).
[946] In this sense V. Mak, 'A shift of focus: Systematisation in European private law through EU law', *ELJ* 2011, p. 417: '[Principles] are anchor points, able to ensure the observance of fundamental values and a coherent development of the legal system, while leaving room for further development according to the needs of society.' Similarly V. Trstenjak, E. Beysen, 'European consumer protection law: *Curia simper dabit remedium*?', *CMLRev* 2011, p. 116.
[947] M.W. Hesselink, 'The Principles of European Contract Law: Some choices made by the Lando Commission', in: M.W. Hesselink, G, de Vries (eds.), *Principles of European Contract Law, Preadviezen uitgebracht voor de Vereniging voor Burgerlijk Recht*, Deventer: Kluwer 2001, p. 13
[948] C. Mak, 'Hedgehogs in Luxembourg?' A Dworkinian reading of the CJEU's case law on principles of private law and a reply of the fox', *CSECL Working Paper* 2011, p. 17.

This paragraph will discuss the unpredictability that may arise from the 'discovery' of general principles by the judiciary, turning firstly to the reallocation of competences that may arise from the use of general principles and secondly to the weaknesses of the inductive process.

1) The use of general principles gives the impression that law is discovered. Because it does not entail the development of 'new' law, the discovery of principles is not subject to principles of conferral of competence, even though principles may profoundly affect the further development of European private law as well as the allocation of competences between the Union of its Member States.[949]

Devroe[950] points out that although formally, the Court merely discovers an already existing principle, the recognition of that principle enables the Court to evaluate whether private law is in conformity with these principles. Referring to CJEU decisions such as *François*,[951] Devroe further argues that the Court may even, by using general principles, extend the scope of existing European law.

Moreover, the emphasis on the 'discovery' of general principles suggests that the discovery of such principles takes place in a neutral, objective manner. This can however be doubted,[952] especially if "general principles" denote society's ideas on justice, which may differ among the legal orders.

2) Finding general principles of private law typically takes place through inductive reasoning, which has been defined as: 'the process of inferring a general law or principle from the observation of particular instances'.[953]

A well known example of inductive reasoning is the conclusion that all swans are white because of all the separate instances (swans a, b, c, d, e, f, etc) are white. The weakness in this form of reasoning lies in the assumption that from the separate instances, a more general conclusion logically follows, while that may not necessarily be the case. Thus, objections can be made against such 'discovery' of general principles. Accordingly, Collins[954] points out that generalisation of the repetitively used of withdrawal periods in the consumer *acquis* to general contract law, on the basis that the use of withdrawal periods can be explained by the principle of self-determination,[955] may not be without risk, because the European legislator may have consciously limited the use of withdrawal periods to specific fields.

Although the fragmented nature of the *acquis* may make the problems of inductive reasoning more apparent, this weakness in the discovery of general principles is not particular to the *acquis*. At a national level, Scholten[956] considers that finding general principles on which specific rules are based may not necessarily lead to the conclusion that some rules can be also be applied in situations that fall outside of the scope of the rule. Interestingly, Lord Goff[957] warns against a number of pitfalls that can occur in the search of legal principles, including the 'temptation of elegance': just because a solution is

[949] S. Weatherill, 'The "principles of civil law" as a basis for interpreting the legislative acquis', *ERCL* 2010, p. 77.
[950] W. Devroe, 'Impact van door het Europees Hof van Justitie ontwikkelde algemene beginselen op privaatrechtelijke verhoudingen', in: A.S. Hartkamp, C.H. Sieburgh, L.A.D. Keus (eds.), De *invloed van het Europese recht op het Nederlandse privaatrecht I*, Kluwer: Deventer 2007, p. 134-135.
[951] CJEU 19 November 1991 (Francovich and others v Italian Republic), joined cases C-6/90 and C-9/90, ECR [1991], p. I-5357, par. 32-36.
[952] S. Weatherill, 'The "principles of civil law" as a basis for interpreting the legislative acquis', *ERCL* 2010, p. 74-85, A. Metzger, 'Allgemeine Rechtsgrundsätze im europäischen Privatrecht: Ansätze für eine einheitliche Techniqueenlehre im europäischen Mehrebenensystem', *Rechtstheorie* 2009, p. 325.
[953] Comp. the definition of the Oxford English Dictionary that defines 'induction' as '[t]he process of inferring a general law principle from the observation of particular instances'. J. Vickers, 'The problem of induction', *Stanford Encyclopedia of Philosophy*, accessible at http://plato.stanford.edu/entries/induction-problem/ points out that this definition is not completely correct, as inductive reasoning is generally considered to include more instances of reasoning than the one stated in the OED.
[954] H. Collins, 'The alchemy of deriving general principles of contract law from European legislation: In search of the philosopher's stone', *ERCL* 2006, p. 221.
[955] As defended by K. Riesenhuber, 'System and principles of EC contract law', *ERCL* 2005, p. 297.
[956] P. Scholten, *Algemeen Deel*, Kluwer: Deventer 1974, p. 45-46.
[957] Lord Goff, 'In search for principle', *Maccabean lectures on Jurisprudence, Proceedings of the British Academy* 1984, p. 174-177.

simple and elegant, does not necessarily mean that it is accurate, that it allows for exceptions and further qualifications, or that it adequately reflects a complex area of law.

Accordingly, Metzger[958] notes that the inductive process may entail that general principles do not have absolute effect. Instead, principles should be seen as "*Abwägungsgebote*" – thus, they may play a role in the arguments that have a 'dimension of weight' for actors forming private law. Alternatively, principles, in Metzger's view, may be seen as rules that are "probably" binding, as the inductive reasoning process may not be suitable for definite conclusions – findings based on inductive reasoning may instead be valid until there is an 'atypical' instance (the black swan) that disproves the finding.

3) It may difficult to predict which general principles may be discovered.

Devroe[959] rightly points out that similarity of national laws may not necessarily point to the existence of a general principle in European law. But if private laws show great similarities and a general principle is not recognised, is there an additional requirement for the recognition of general principles? Metzger[960] finds that the recognition of general principles may depend on either extra-legal elements such as the views of justice in society, or the political aims of the Union. This answer does not improve the predictability or accessibility of private law, as courts frequently only briefly refer to general principles without giving insight in the premises upon which the courts inductive conclusions are based.[961] Confusingly, however, general principles can be recognised in the absence of similarity of laws, and thus, it seems as if the similarity between private laws is not a strict requirement of in some cases.

The lack of predictability on the recognition of principles becomes apparent from the drafting of the DCFR. Initially, the Interim Outline Edition[962] sought to introduce a number of fundamental principles, including 'justice', 'solidarity' as well as 'legal certainty' and 'efficiency'. These principles were however severely criticised,[963] because the restrictions in the interim draft of party autonomy went too far, that rules of non-discrimination were ineffective, and that private law in general did not aim to further 'distributive justice'. Accordingly, the later 2009 outline edition[964] had substantively altered the principles underlying European private law, to freedom, security, justice and efficiency, unfortunately without explaining why the drafters had chosen to alter their approach and what elements of the general principles suggested in the 2008 edition were still adhered to.[965]

4) Even the use of clearly recognised principles may still leave lack of clarity,[966] because general principles do not single out one particular rule or conclusion.[967] Typically, various conflicting principles play a role in the development of private law and the

[958] A. Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht*, Mohr Siebeck: Tübingen 2009, p. 60-61, p. 546, A. Metzger, 'Allgemeine Rechtsgrundsätze im europäischen Privatrecht: Ansätze für eine einheitliche Methodenlehre im europäischen Mehrebenensystem', *Rechtstheorie* 2009, p. 315, p. 317-318.
[959] W. Devroe, 'Impact van door het Europees Hof van Justite ontwikkelde algemene beginselen op privaatrechtelijke verhoudingen', in: A.S. Hartkamp, C.H. Sieburgh, L.A.D. Keus (eds.), De *invloed van het Europese recht op het Nederlandse privaatrecht I*, Kluwer: Deventer 2007, p. 136, similarly V. Mak, 'A shift of focus: Systematisation in European private law through EU law', *ELJ* 2011, p. 422.
[960] A. Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht*, Mohr Siebeck: Tübingen 2009, p. 219, p. 466.
[961] A. Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht*, Mohr Siebeck: Tübingen 2009, p. 546, as well as A. Metzger, 'Allgemeine Rechtsgrundsätze im europäischen Privatrecht: Ansätze für eine einheitliche Methodenlehre im europäischen Mehrebenensystem', *Rechtstheorie* 2009, p. 323.
[962] C. von Bar et al. (eds.), *Draft Common Frame of Reference, Interim Outline Edition, Introduction*, Sellier: Munich 2008, par. 22
[963] H. Eidenmüller, 'Party autonomy, distributive justice and the conclusion of contracts in the DCFR', ERCL 2009, p. 109-131.
[964] C. von Bar et al. (eds.), *Draft Common Frame of Reference, Outline Edition, Principles*, Sellier: Munich 2009.
[965] See critically M.W. Hesselink, 'If you don't like our principles we have others'. *CSECL Working Paper* 2008.
[966] Comp. Lord Goff of Chievely, 'The future of the common law', *International and Comparative Law Quarterly* 1997, p. 753: 'Continental lawyers love to proclaim some great principle, and then knock it into shape afterwards. Instead, the boring British want to find out first whether, and if so, how these great ideas are going to work in practice.'
[967] Lord Goff, 'In search for principle', *Maccabean lectures on Jurisprudence, Proceedings of the British Academy* 1984, p. 174-177 has pointed out that even if legal principles are established, one may still not know a complete answer to a particular problem, especially as the law is continually developing.

adjudication of disputes. In the absence of an established hierarchy between principles, the outcome in individual cases is not predetermined by these general principles.[968] Instead, the choice for a specific outcome is influenced in the preferences of the legislator, the judge or the academic.[969]

For example, article 6:2 Dutch Civil Code stipulates that contracting parties have to comply, in their behaviour towards one another, with the principle of fairness ('*redelijkheid en billijkheid*'), but that duty still leaves open how contract parties' rights and duties arising from contracts are affected in individual cases. The consequences of choices between, for example, predictability and fairness may instead become clear in specific cases.[970] Similarly, if the CJEU concludes that a general principle of civil law exists – the principle that 'full performance of a contract results, as a general rule, from discharge of the mutual obligations under the contract or from termination of that contract',[971] lack of clarity may arise with regard to the applicability of this principle in areas that fall beyond the scope of the Directive.[972] Consequently, a decision based on principles may still give rise to questions how private law will be developed in individual cases.

Nevertheless, in individual cases, principles may have far-reaching impact on the development of European private law.[973] A well-known example of far-reaching and unexpected development on the basis of the principle of legal equality is the CJEU ruling in *Mangold*[974] that set aside provisions of private law that parties had relied on.

►Thus, general principles may profoundly affect the development of the law, but both the recognition of principles and the further development of the law on the basis of principles may undermine the predictable development of private law.

7.5.2.2. The discovery and the use of general principles: problems of accessibility

Problems of inaccessibility may arise especially as general principles do not necessarily have to be written. General principles introduce an *unwritten* source of private law, alongside other sources of private law, which does not benefit accessibility.[975] Admittedly, private parties can look at case law and use decisions of the judiciary as a starting point to discover general principles. However, case law can only offer a starting point, which moreover may be subject to change. Furthermore, courts may not make explicit on what premises they base

[968] R. Dworkin, *Taking rights seriously*, Duckworth: London 1977, p. 25-26.
[969] Accordingly, K.P. Purnhagen, 'Principles of European private or civil law? A reminder of the symbiotic relationship between the CJEU and the DCFR in a pluralistic European private law', *CSECL Working Paper* 2011, p. 4, points to the relevance of the question which actor has the competence to 'find' principles.
[970] See for example HR 28 April 2000, *NJ* 2000, 430.
[971] CJEU 10 April 2008, (Hamilton v Volksbank Filder eG), C-412/06, ECR [2008], p. I-2383, par. 42.
[972] S. Weatherill, 'The "principles of civil law" as a basis for interpreting the legislative *acquis*', *ERCL* 2010, p. 77.
[973] W. Devroe, 'Impact van door het Europees Hof van Justitie ontwikkelde algemene beginselen op privaatrechtelijke verhoudingen', in: A.S. Hartkamp, C.H. Sieburgh, L.A.D. Keus (eds.), De *invloed van het Europese recht op het Nederlandse privaatrecht I*, Kluwer: Deventer 2007, p. 133, considers the use of general principles as one of the most powerful tools of lawyersin European law.
[974] CJEU 22 November 2005 (Mangold v Helm), C-144/04, [2005] ECR, p. I-9981, par. 59-65, 74. In this decision, the Court established that in the European legal order, a general principle of legal equality prohibiting discrimination on the basis of age, existed, on which Directive 2000/78 was based. This principle, as discovered by the court, could set aside German law stipulating that although objective reasons needed to be given for the conclusion of fixed term employment contracts, these objective reasons were not required if the employee was, at the time of conclusion of the employment contract, 52 years or older. Although the court considered that this exception, which was made in order to reduce the unemployment of people over the age of 52 in Germany, legitimate, it was not proportional to the aim it pursued, also considering that the age of workers was the only criterion for the exception, notwithstanding other relevant circumstances. Both the recognition of this principle and the effects in this case are not entirely uncontroversial. For example, A.S. Hartkamp, 'The general principles of EU law and private law', *RabelsZ* 2011, p. 246 calls the recognition of this principle 'unconvincing'.
[975] Comp. the view that principles may also be used to introduce 'society's views' into private law- thus, principles introduce an interaction between private law and society: J.H. Nieuwenhuis, *Drie beginselen van contractenrecht* (PhD thesis Leiden) Kluwer: Deventer 1979, p. 41-42.

general principles. Metzger[976] rightly points out that especially national civil law courts as well as the CJEU frequently do not make all of the premises on which they base the recognition of a general principle explicit. Especially if extra-legal elements, such as moral or political points of view play a role in the recognition of general principles, these may not always found in either statutes or case law. Yet for private parties these underlying ideas on justice, and their consequences in individual cases, may not always be self-evident.

However, simultaneously, the development of private law on the basis of general principles may also increase accessibility as it contributes to the development of private law in accordance with society's legal views on justice, which in turn will facilitate the understanding of private law for parties not familiar with private law.

7.5.2.3. Conclusion

Thus, the development of private law on the basis of general principles also shows weakness, particularly with regard to the predictable development of private law. This lack of rpedictability can be traced to the way principles are 'discovered' as well as the application of principles in individual cases and their effect on the outcome of disputes. Also, general principles are an unwritten source of law that may undermine the accessibility of the law. However, simultaneously, the development of the law on the basis of general principles may also increase responsiveness, which in turn is advantageous for accessibility. Nevertheless, actors involved in the development of private law should take into account these potential problems and seek to alleviate these problems, by making the recognition of principles more insightful and by mitigating the effect that principles may have on the outcome of individual cases. Alternatively, literature could seek to provide more insight in underlying ideas – although if the premises of courts are not made explicit, the insight provided by literature may necessarily have to rely upon some amount of guesswork.

7.5.3. Conclusion on the use of principles

This paragraph has asked whether general principles are used as a starting point for interaction, and how that has affected the predictability, accessibility, consistency and responsiveness of European private law.

Actors law have have recognised that principles may serve as a starting point for interaction. Accordingly, general principles may be a useful starting point for developing harmonised law and may serve as a starting point for debate. This use of general principles also allows for flexibility in the development of harmonised private law. However, actors have not consistently adopted this approach – thus, general principles in soft law have not sufficiently prompted debate, and the both national courts and the CJEU have not consistently referred to principles common to the Member States.

The use of general principles may also undermine the predictable development of private law, particularly because of a lack of clarity with regard to the recognition and further application of principles. A more careful use of general principles that is aimed at interaction may however lessen current problems of unpredictability as well as inaccessibility. These weaknesses should therefore not stand in the way of a more prominent role of general principles in the development of private law as a starting point for interaction.

[976] A. Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht*, Mohr Siebeck: Tübingen 2009, p. 219, 412, 466, 546.

7.6. Conclusion

Generally, in the development of the private law through codification, soft laws, blanket clauses, and general principles, actors have not adequately taken into account that other actors also develop private law and that, therefore, **the ability of actors to safeguard benchmarks of predictability, accessibility, consistency and responsiveness through these techniques has been diminished:**

i) The extent to which codifications can ensure the predictable, accessible, consistent and responsive development of private law is diminished as the private law *acquis* develops.
ii) The extent to which soft laws can contribute to the predictable, accessible and consistent development of private law decreases as national and European state actors, as well as other groups of academics, develop national private law, the *acquis* and competing sets of soft law.
iii) The extent to which blanket clauses can guarantee the responsive and consistent development of private law is lessened as national and European actors have both used identical blanket clauses.
iv) The extent to which general principles can provide a starting point for interaction between actors that support the responsiveness of private law to legal views on justice is weakened as general principles play a different role in the development of national private law and the *acquis*, while it is not clear what principles play a role in the development of the *acquis*.

European actors have a different view on how to ensure that the law develops in accordance with benchmarks of predictability, accessibility, and consistency of private law. The focus of European actors is on the quality of private law in cross-border situations. However, the *acquis* does not meet these benchmarks, which may severely undermine the extent to which the *acquis* enhances the functioning of the internal market.

Also, **European actors do not**, as such, **focus on ensuring the quality of private law**, **an increasingly complicated task that is mostly left to national actors**. In turn, the focus of national actors to ensure the quality of their codifications is a reason for a defensive approach to European developments. National actors, rather than reconsidering the way in which they develop use national techniques, emphasise the quality of their codifications – and not without reason.

Moreover, in particular, **national actors are much better positioned to ensure the responsiveness of private law** to national practices as well as national legal views on justice. **Techniques that are particularly suited to ensure responsiveness are blanket clauses and general principles**, that are however also used by European actors. Yet European actors have developed an approach in which the lack of predictability and consistency of the law developed through these techniques is emphasised. These weaknesses may be reinforced as actors use these techniques uncritically, without considering the role of the CJEU and national courts, and do not sufficiently interact on how they develop the law through these principles. Instead, European actors stress the need for further harmonisation to mitigate these problems. Unfortunately, **more harmonisation may limit the extent to which blanket clauses contribute to the responsiveness of the law**, as well as the consistency of national law.

Because interdependence in ensuring the quality of European private law has not been recognised as such, interaction between actors has not paid attention to interdependence, nor have actors, in interacting with one another, expressly considered the use of techniques. Instead, in interacting with one another, state actors pursue their own interests – European actors want to further develop the *acquis* and collect political support, while national actors maintain their national laws, promote their own private laws as a model for the *acquis* (which may well be beneficial for the *acquis*), and more generally their own interests within the Union.

Consequently, **the way that actors interact with each other should be adjusted**. National actors are used to debate on the development of private law, without debating on questions of legislative competence and the aim of private law, while these questions are important at the European level. The attention of national state actors, national practitioners and scholars in particular seems to be concentrated on national law and national issues.[977] Possibly, as international traffic and international legal relationships increase, the limited ability of national actors to cope with problems arising in a cross-border context will become more apparent. This perspective firstly makes it less likely that the debate at the European level will focus on the question whether the reallocation of legislative competences to the European level, the effect of harmonisation, or the roles of actors as competences are reallocated or as alternative regulation develops.

Actors' different perspectives have likely also contributed to the separation between debate on national private law and debate on private law at the European level. More participation of legal practitioners and the judiciary from the national level may also be beneficial as these actors are presumably well-placed to signal problems arising in legal practice. However, the question arises why practitioners and judges would have an interest in development of foreign private law or the development of private law at the European or international level. Perhaps practitioners in areas of private law with an inherent cross-border aspect, such as international private law, or intellectual property have more interest in development of private law at a European or international level than practitioners in more 'nationally' developed areas. However, eventually, 'nationally' oriented areas may well become possible objects for harmonisation.

Furthermore, **the perspective of national actors makes it less probable that the use of techniques in the multilevel legal order is subject to debate**. This not only means that the use of national techniques is not the result of careful consideration, it also means that the possible development of alternative regulation is currently overlooked and that successful national techniques are tranferred to the European level. This 'national' approach to private law has also been visible in the increased move to a more horizontal approach to harmonisation, one may also ask whether this approach also suits the European legislator who does not have a general competence to legislate in the area private law, but rather pursues the objectives of the Treaties.[978] Transferring successful national techniques to the European level may also be problematic because these techniques are typically not used in isolation from other techniques, but in combination with one another. Therefore, if a technique is transferred to the European level, it is not clear how this technique will function without the use of additional techniques.

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[977] Comp. S. Prechal, R.H. van Ooik, J.H. Jans, K.J.M. Mortelmans, 'Europeanisation of the law: Consequences for the Dutch judiciary, Report of October 2005, available at http://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/WetenschapsOnderzoek/Overzichtonderzoeksprojecten/Europeanisering/Pages/default.aspx, p. 49-50.

[978] J.M. Smits, 'The Draft Common Frame of Reference, methodological nationalism and the way forward', *ERCL* 2008, p. 274-276 describes this national approach to developing private law as 'methodological nationalism', as well as L. Miller, *The emergence of EU contract law: Exploring Europeanization*, OUP: Oxford 2011, p. 167.

The similarly uncritical approach of the European legislator to the use of techniques is especially unfortunate because the European legislator pursues a specific aim, and consequently, one would expect more focus on the question how to achieve that aim. **Thus, debate should focus more on the use of techniques**. This means that actors should reconsider simply transferring successful national techniques to the European level, and also consider alternatives to traditionally used techniques. **Interaction may entail that actors become better acquainted with alternative approaches from other actors and benefit from experiences in other legal orders.** Possibly, this may make actors more aware of strengths or shortcomings in the techniques they use and provide them with a more critical perspective on the use of techniques. It is also important that they reconsider what these techniques can realistically achieve. Typically, the use of national techniques may also lead one to compare the use of those techniques at a European level with the use of techniques at a national level. If the European use of a national technique is not as successful as the national use, does that mean that the use of that technique is problematic?

In some cases, interaction need not necessarily take place *between* actors. More clearly communicating actors' approach may provide more clarity to other actors. Accordingly, more clarity on what grounds principles will be accepted or rejected may increase the predictability and accessibility of private law developed through general principles.

However, in some cases, interaction between actors in the legislative process may undermine efficient decision-making, or interaction between national courts and the CJEU may delay decisions in relatively straightforward cases. Notably, the chance of detrimental interaction may be increased if debate does not meet the requirements for deliberation.

Therefore, **interaction is not a value in itself**, but rather serves to make actors aware that other actors also develop private law and that the extent to which national techniques ensure the predctiability, accessibility, consistency and responsiveness of the law is diminished. It follows that this thesis has not and will not make an argument for as much interaction between actors as possible.

In some cases, the diminished ability of techniques to contribute to the comprehensibility of European private law, may not be an attractive idea, and perhaps, if less interaction takes place, the limitations to national techniques are not as apparent. Moreover, if initiatives of actors undermine the quality of private law, other actors may seek to avoid too much interaction with these actors, in order to maintain the quality of private law.

If the initatives of other actors undermine the quality of private law, the lack of interaction does not seem directly problematic for private parties in terms of predictability, accessibility, consistency and responsiveness, but the lack of interaction in itself indicates problems. What if this also the case for the private law *acquis*?

Avoiding interaction does not mean that European actors will cease to develop the law and a lack of interaction will only enhance the chance that the *acquis* will disturb the quality of national law. Thus, while no interaction – for example between national courts and the CJEU – may be beneficial for private parties, it is not a long term solution that can moreover be undermined as courts across the Union may not show similar restraint in referring questions to the CJEU. Eventually, keeping silent and ignoring the role of the European legislator and the unclear role of the CJEU where possible is not going to improve the quality of private law. Thus, **European private law can only be improved if actors sufficiently interact with one another.**

Chapter 8: The use of additional and alternative techniques

8.1. Introduction

The previous chapter has considered the use of national techniques in the multilevel legal order. What is often overlooked, however, is that actors do not use these techniques in isolation from one another; they use techniques in combination with one another. In nation states, techniques that facilitate interaction between actors, such as consultations, databases and networks, are typically used in the development of private law. Although actors are familiar with the use of these techniques and frequently rely on them, they have not considered these techniques as a means to improve the quality of European private law, perhaps because the focus of private law debate is not on the use of techniques. Therefore, this chapter will ask what techniques can be used in addition to or instead of currently used techniques that will support the extent to which national techniques contribute to the predictability, accessibility, consistency and responsiveness of European private law.

Paragraph 8.2. will consider additional techniques that are typically used to support the legislative process. Paragraph 8.3. will consider additional techniques that more particularly aim to strengthen the extent to which blanket clauses can contribute to benchmarks of predictbility, consistency and responsiveness. Paragraph 8.4. will consider whether more attention for STC's will enhance the predictable development of the private law acquis, which could help actors to maintain the predictable development of private law. Paragraph 8.5. will ask whether the use of the Open Method of Coordination (hereafter: 'OMC') coud contribute to the responsiveness of legislation. Paragraph 8.6. will consider alternative techniques and paragraph 8.7. will end with a conclusion.[979]

This chapter does not aim to provide a comprehensive overview of techniques that could be used in addition or instead of currently used techniques. Instead, the chapter will focus on the use of techniques that seem particularly suitable to cope with the problems detected in the use of codifications, blanket clauses and general principles. These techniques may be particularly suitable to further interaction between actors. This is the case for additional techniques that typically support the legislative process, discussed in paragraph 8.2. Other alternative techniques may be particularly suited to deal with problems arising from the use of a particular techniques, such as blanket clauses, discussed in paragraph 8.3. Alternativey, techniques may form an alternative for European measures that may limit national legislators' ability to maintain the predictability, consistency, accessibility and responsiveness of the law through codifications and blanket clauses.

8.2. Additional techniques supporting the legislative process

What additional techniques could support the legislative process in the multilevel legal order? Weaknesses in the use of codifications and blanket clauses may be traced to defects in the legislative process. Shortcomings in this process have been detected in the Dutch legal order,

[979] This distinction between additional and alternative techniques is not meant to be used as a sharp distinction. However, considering the shortcomings visible in the legislative process, additional techniques that could especially support this process will be considered firstly, and separately, because of the important role of the legislative process. Other additional and alternative techniques are discussed subsequently, but they may well show overlap. However, alternative techniques are discussed after additional techniques have been discussed as their use may necessitate more change in the use of techniques. Accordingly, the use of additional and alternative techniques that are less disruptive for actors involved in the development of private law will also be discussed before turning to more disruptive techniques.

where the long period of reforms and overlooking relevant comments have been criticised. [980] In the German legal order, the too frequent amendments in the BGB, the implementation of the *acquis* and 'blunders' have been criticised.[981] At the European level, the lack of openness and debate has been criticised. [982] The reasoning in courts does not show similar shortcomings, but courts have not sought to compensate, insofar as possible, weaknesses in the implementation of Directives by referring to foreign courts and the CJEU.[983] Both in the German[984] and Dutch[985] legal order, courts have exercised restraint in referring to the CJEU and referring to foreign law. This restraint may however also be traced to the restraint of parties to adjudication in relying on comparative law arguments, especially where comparative law is not directly relevant or not to the benefit of parties' position.

This does not mean that the legislative process cannot lead to successful initatives, which are also visible, such as the BW,[986] as well as the Community trademark.[987] In these

[980] H.M. Vletter- van Dort, 'Horen, zien en luisteren', *Ondernemingsrecht* 2011, 73. has signalled a tendency for government officials to ignore advice on legislative proposals that they find inconvenient. Eventually, this trend might result in legislation ignoring the needs and preference of legal practice. Redactie WPNR, 'Onvrede over wetgevingsproces', *WPNR* 6868 (2010) (the editorial board of a prominent Dutch journal) has also expressed dissatisfaction with the reform of Dutch company law, as well as other projects, including the reform of the law on the community of property, as well as the introduction of title 7.13 on trading partnerships.. Comp. also critically on the reform of insolvency law F.M.J. Verstijlen, 'Alles (te) rustig aan het wetgevingsfront', *TvI* 2011, 12, N.E.D. Faber, R.G.J. Nowak, 'Hoezo wetgevingskwaliteit?', *NJB* 2001, 12. However, recently, reformsin insolvency law have taken place – comp. for example the inclusion of article 22bis Invorderingswet on the position of the tax collector in insolvencies.

[981] J. Huber, 'Das Gesetz zur Beschleunigung fälliger Zahlungen', JZ 2000, p. 966 has criticised the approach of the German legislator towards late payments. More drastic criticism has been voiced by W. Flume, 'Vom Beruf unserer Zeit zur Gesetzgebung', ZIP 2000, p. 1427, on the implementation of Directive 97/7 on distance contracts and in particular the introduction of articles 13 and 14 BGB introducing a definition of respectively consumers and entrepreneurs. Similarly, H.H. Seiler, 'Bewahrung von Kodifikationen in der Gegenwart am Beispiel des BGB', in: O. Behrends, W. Sellert (eds), Der Kodifikationsgedanke und das Modell des Buergerlichen Gesetzbuches, Van den Hoek & Ruprecht: Göttingen 2000, p. 109-110 has criticised the "Regelwut" (regulatory frenzy), which he traces to the need to involve a large amount of committees in a process without an actor who clearly has final responsibility for a product – in this case a provision in the BGB. Moreover, Seiler points to the increased emphasis of policy aims and the need to realise this through speedy legislation, which, in his opinion, lead to 'Wegwerfgesetze'. R. Zimmerman, 'Characteristic aspects of German legal culture', in: J. Zekoll, M. Reimann (eds.), *Introduction to German law*, Kluwer Law International: the Hague 2005, p. 17 has criticised German legislative practices, referring to 'blunders' that 'have given rise to doubts whether the German legislature is still capable today of legislating in an academically sound and responsible manner.'

[982] W. Doralt, 'Strukturelle Schwächen in der Europäisierung des Privatrechts', *RabelsZ* 2011, p. 280. refers to the withdrawal of a critical member of the Expert Group studying the possible uses of the DCFR (Prof. S. Whittaker), and notes that the relatively rapid withdrawal does not give the impression that many opportunities for debate arise within the Expert Group: See also R. Zimmerman, 'Europäisches Privatrecht – Irrungen, Wirtungen', *Max Planck Private Law Research Paper* 2011, p. 22 and K. Riesenhuber, 'A competitive approach to EU contract law', *ERCL* 2011, p. 119-121 who notes that the time pressure in the drafting of the DCFR may have severely curtailed opportunities for wide consultation and responses from a wide range of stakeholders and experts.

[983] More interaction between courts has been defended especially strongly by M. Lutter, 'Die Auslegung angeglichenen rechts', *JZ* 1992, p. 604, but also by H. Kötz, 'Der Bundesgerichtshof und die rechtsvergleichung', in: C.-W. Canaris et al (eds.), *50 Jahre Bundesgerichtshof, Festgabe aus der Wissenschaft, II*, Beck: Munich 2000, p.835, and, more recently, J. Brinkhof, *De Europese uitdaging voor rechtspraak, rechtswetenschap en onderwijs* (valdictory address Utrecht), 2010, p. 10. J.B.M. Vranken, 'Taken van de Hoge Raad en zijn parket in 2025', in: I. Giesen, A.M. Hol, (eds.), *De Hoge Raad in 2025: Contouren van de toekomstige cassatierechtspraak*, BJU: The Hague 2011, par. 2.5. has also emphasised the need for interaction between the judiciaries, as they are increasingly confronted with cross-border cases, and O. Remien, 'Einheit, Mehrstufigkeit und Flexibilität', *RabelsZ* 1998, p. 633 has also supported the idea of interaction between the CJEU and national courts, suggesting that national courts referring a question to the CJEU may provide insight in questions of national law, while other states and experts may provide expertise on other national laws with regard to the question.

[984] For the BGH, restraint has been deduced from the relatively limited amount of cases in which the BGH has referred to foreign courts by M. Siems, 'The adjudication of the German Federal Supreme Court, 2007, *Oxford University Comparative Law Forum*, 4, at ouclf.iuscomp.org. That does not mean that comparative law reasoning cannot be found in promoinent cases; comp. the examples in E. Kramer, 'Konvergenz und Internationalisierung der juristischen Methode', in: Meier-Schatz (ed.), *Die Zukunft der Rechts*, Helbing & Lichtenhahn: Basel/Geneva/Much 1998, p. 83.

[985] V. van den Eeckhout, 'The application of foreign law by judicial and non-judicial authorities – The Netherlands', via www.ssrn.com, p. 6 indicates that national courts seem to prefer to apply national law rather than foreign law, in order to avoid difficulties with regard to establishing the content of foreign law. The *Hoge Raad* provides an exception to this point as A.G.s may include comparative private law in their conclusions, but the extent to which the Hoge Raad does so has been criticised by J.M. Smits, E.A.G. van Schagen, 'De Hoge Raad als Europese rechter: Mag het ietsje meer zijn?', in: A.G. Castermans et al (eds.), *Het zwijgen van de Hoge Raad, BWKJ 25*, Kluwer: Deventer 2009, p. 79.

[986] W. van Gerven, S. Lierman, *Algemeen Deel, Veertig jaar later*, Kluwer: Deventer 2010, p. 192 however consider the Dutch codification, especially the involvement of Parliament, as well as the emphasis on comparative law in the drafting of the code, as 'atypical', and doubt whether Parliaments, especially Parliaments that focus more on their responsibility to exercise political control on the executive rather than its role in the legislative process, can still have a decisive say in the drafting of codifications.

[987] Regulation 207/2009 on a Community trademark.

cases, it seems as if the democratic process does guarantee open and transparent debate, and thus has a clear added value over private law that is formed by actors that do not similarly allow for open and transparent debate.

Interestingly, the shortcomings visible in the legislative processes coincide with comments for more debate. [988] Some authors [989] have argued for deliberation, [990] i.e., discourse that takes place in a pluralistic society where groups and subcultures – and in the European Union, groups and subcultures in different states – have different backgrounds – in terms of, for example, religion – on which they base their convictions about right and wrong, while disputes between those groups may arise on an increasing number of issues. Deliberation takes place between actors that have to be able to put themselves in the position of other actors, who are trying to reach consensus based on as many rational arguments as possible.

Although deliberation may not necessarily achieve consensus on future action, generally limits the number of options for future action, and also contributes to the quality of those options. These options can subsequently be taken as a starting point in decision-making and facilitate political compromise. For European private law, this means that debate has to meet the following requirements:

1) Representativeness

A deliberative process should include a representative number of stakeholders, state actors, and experts.[991] Interestingly, Van Gerven and Lierman[992] have suggested that actors who are well placed to represent the interests of stakeholders, and who are well placed to gather information in a transparent and professional manner, should have a prominent place in deliberative discourse.

2) Inclusiveness

[988] L.A.J. Senden, 'De lidstaten en de kwaliteit van Europese wetgeving: geen consumenten, maar co-actoren', *SEW* 2006, p. 57 has argued that problems with regard to European legislation and a lack of interaction between actors should not be seen in isolation: if a Directive, because of its detailed nature, leaves no room for discretion to the national legislator that has to implement it into national law – which seems frequently the case in European private law – the national legislator has less possibilities to cope with fragmentation in national private laws, and may choose to copy-paste the Directive into national law, a phenomenon not unfamiliar in European private law. W. van Gerven, S. Lierman, *Algemeen deel. Veertig jaar later*, Kluwer: Deventer 2010, p. 146 have held that in order to achieve convergence, cooperation of both state actors – legislators and judges – as well as non-state actors – including legal practice and academics – is necessary. Although the added value of comparative law insights in the drafting of legislation are familiar in private law, the added value of these insights have recently been recognised more generally by W. Voermans et al, *Legislative processes in transition*, WODC: Leiden, The Hague 2012, available at http://www.wodc.nl

[989] J. Neyer, 'Discourse and order in the EU: A deliberative approach to multi-level governance', *JMCS* 2003, p. 690-691 has argued for 'deliberation', in the sense of 'an inclusive and co-operative mode of interaction', which is based on 'claims of factual truth and/or normative validity' while promises and threats are only relied on as a 'last resort', and which mostly takes place prior to official decision-making. Similarly, Ch. Joerges, 'On the legitimacy of Europeanising private law: Considerations on a justice-making law for the EU multi-level system', vol 7.3 *Electronic Journal of Comparative Law* 2003, available at http://www.ejcl.org/ejcl/73/art73-3.html has argued that the interdependence between actors forming European private law necessitates 'a communication-oriented "deliberative" political style'.

[990] J. Habermas, *Between facts and norms, Contributions to a discourse theory of law and democracy*, MIT: Cambridge Mass. 1996, 2nd ed.Comp. the translator's introduction: 'As understood by participants engaged in interaction and discourse, truth claims are claims about the objective world that all human beings share, and moral claims have to do with norms for interpresonal relationships that any autonomous adult should find rationally acceptable from the standpoint of justice and respect for persons', p. xv.

[991] Comp. J. Neyer, 'Discourse and order in the EU: A deliberative approach to multi-level governance', *JMCS* 2003, p. 694, who notes that wide participation involves and connects important actors, and also increases responsiveness. C. de la Porte, P. Nanz, 'The OMC – a deliberative-democratic mode of governance? The cases of employment and pensions', *JEPP* 2004, p. 270-271 distinguish the argument of Joerges and Neyer for deliberative supranationalism from deliberative democracy defended by Habermas. They rightly argue that Joerges and Neyer focus on comitology, where experts involve in evidence-based deliberative discourse. Notably, deliberative discourse ideally takes place within a limited circle of people with sufficient expertise, as is the case in comitology. However, this paragraph seeks to extend the ideal of deliberation to the democratic procedures at especially the European level.

[992] W. van Gerven, S. Lierman, *Algemeen Deel, Veertig jaar later*, Kluwer: Deventer 2010, p. 287: ''voorang zou [kunnen] worden gegeven aan organisaties die dusdanig gestructureerd zijn dat zij specifieke en algemene belangen van burgers naar buiten toe kunnen vertegenwoordigen, en bij machte zijn om informatie op een transparante en deskundige wijze te verzamelen, haar intern af te toesten, en degene te verspreiden die nuttig is voor het nemen van beleidsbeslissingen'.

A deliberative process should include all relevant actors. Relevant actors are actors whose rights are affected by the development of European private law. This also entails that foreign parties should have the possibility to participate in the drafting of national private law if national private law affects the rights and duties of foreign contract parties. If foreign parties that do not democratically elect the national Parliament are involved in the development of national private law, this may also limit potential *Fremdbestimmung*.

Inclusiveness may also mean that the differences in the availability of financial and organisational resources, as well as expertise, should be neutralised as far as possible. Meuwese[993] points out that the necessary equality presupposes a number of circumstances, including the ability of actors to place themselves in the position of other actors participating in debate, which should be demonstrated in deliberative discourse.

3) Openness and transparency.

Debate should be open and transparent, which forces actors to account for their choices and give insight in the arguments used to justify such choices. Ideally, in the development of European private law, such transparent debate may give more insight into the arguments leading to the formation of rules. Such insight may '[sharpen] our focus on the weight of competing considerations. And it reminds us that the law is part of the world of competing ideas markedly influenced by cultural differences'.[994]

4) Actors should be able to gain an overview of debate.

Deliberation should not lead to a 'cacophony of viewpoints',[995] or 'or a 'noisy dialogue of the deaf'.[996] To avoid too much cacophony, it would be necessary that deliberation takes place in a coordinated manner, for example within the framework of the newly established European Law Institute.[997]

5) Actors should not use the debate to primarily pursue their own interests

Actors participating in the debate must be willing and able to reflect on the arguments by other parties, instead of seeking to further their own interests. Currently, that may not always be the case. Hirsch Ballin[998] states that '[m]any Member States representatives participating in the decision-making are driven by the desire to derive the greatest possible benefit and the least possible incoinvenience.' The question however arises whether a deliberative attitude can be imposed on actors.

Various additional techniques may improve debate, which can be a step towards deliberation.[999]

Paragraph 8.2.1. will turn to consultations and paragraph 8.2.2. will discuss impact assessments. Paragraph 8.2.3. will consider databases and paragraph 8.2.4. will address the use of networks. Paragraph 8.2.5. will end with a conclusion.

8.2.1. Consultations

To what extent can consultations contribute to more interaction between actors in the development of codifications and blanket clauses in the legislative process?

[993] A.C.M. Meuwese, *Impact assessment in EU lawmaking*, Wöhrmann Print Service: Zutphen 2008, p. 42.
[994] *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL), 81, *per* Lord Steyn.
[995] H.-W. Micklitz, 'The visible hand of European regulatory private law. The transformation of European private law from autonomy to functionalism in competition and regulation', *EUI Working Paper* 2008, p. 29.
[996] J. Neyer, 'Discourse and order in the EU: A deliberative approach to multi-level governance', *JMCS* 2003, p. 695.
[997] Possibly, making use of techniques such as networks and databases may also contribute to structuring the debate; see further par. 8.2.3. and 8.2.4.
[998] E.M.H. Hirsch Ballin, 'Reflections on co-actorship', in: E.M.H. Hirsch Ballin, L.A.J. Senden (eds.), *Co-actorship in the development of European law-making'*, TMC Asser Press: The Hague 2005, p. 14.
[999] This chapter does not seek to argue that deliberation is a *de facto* mode of communication in the development of European private law.

Paragraph 8.2.1.1. will summarise current consultation practices and paragraph 8.2.1.2. will discuss shortcomings in the current use of consultations. Paragraph 8.2.1.3. will ask how the use of consultations can be improved and paragraph 8.2.1.4. will end with a conclusion.

8.2.1.1. The current use of consultations

Consultations are used widely in by Dutch, German and European actors, and they are generally recognised as generating input that may prompt the legislator to amend a proposal. In the German legal order, more emphasis has been put on the participation of academics. In particular, proposals from committees of academics, commission by the legislator, may produce a first academic draft ('*Referententwurf*'), which generally prompts debate, sometimes in the form of preliminary reports, which may lead to a proposal of the legislator ('*Regierungsentwurf*'). These proposals will be discussed by the committees, during which stakeholders and experts may also be heard. Moreover, academics may discuss the proposal, insofar it is amended, further. Comments are frequently taken into account. In this procedure, both the academic draft and the legislative proposal are circulated by way of generating debate and feedback.

Similarly, in the Dutch legal order, a committee of academics, commission by the legislator, may issue a first draft, which will generally prompt debate. The draft may lead to a legislative proposal that may subject to further debate and which is advised upon by the *Raad van Staate*. Announcements in journals may further prompt debate and online consultations can be opened for submissions. Consultations usually last around one or two months.[1000] The Dutch legislator has not developed standard consultation procedures. The way in which parties are consulted may differ among departments, and at an ad hoc basis. The inclination of some departments to contact parties that they are already familiar with may benefit 'repeat players'.[1001] Unfortunately, doubts have arisen whether submissions to consultations are generally sufficiently taken into account by Parliament.[1002] Moreover, although some legislative initiatives are taken in the context of regulatory competition, it has not become a habit to consult foreign parties; instead, referral to comparative law is widespread. It has also not a habit to involve actors form the European level in national consultations.

Neither the German nor the Dutch legislator has made it a habit to include foreign or European actors in consultations, not in the drafting process of legislation developed in the light of regulatory competition and not in the implementation of Directives. Notably, national consultations may not be similarly accessible to foreign and European actors. Moreover, national legislators may prefer simply informing the Commission of implementation afterwards, as is already generally required. Especially the possibility that implementation becomes subject to an 'extra' instance of control within the national democratic process may considered as intrusive and therefore problematic. Moreover, the resources of European actors may be limited and participation in consultative procedures throughout the Union may therefore be problematic.

Likewise, the European Commission frequently uses Green Papers in the development of the private law *acquis*, initiating consultations that discussed possible future

[1000] P. Popelier et al, Consulteren over ontwerpregelgeving, available at http://www.wodc.nl, p. 114.
[1001] P. Popelier et al, Consulteren over ontwerpregelgeving, available at http://www.wodc.nl, p. 114.
[1002] T. Cardoso Ribeiro, *Naar een zichtbaar effectieve wisselwerking tussen beleid en uitvoering*, The Hague 28 March 2007, available at http://www.eerstekamer.nl.

action.[1003] These consultations proved to be starting points for especially academic debate on the future of the private law *acquis*, and they have played an important role in the debate on the future of European contract law.[1004] Senden[1005] has however remarked that the Commission is generally not under a duty to take the outcomes of consultations into account.

Thus, consultations aim to generate interaction between relevant actors and thereby contribute to the quality of legislation.

8.2.1.2. Shortcomings in the use of consultations

Various shortcomings may be detected in the use of consultations by both national legislators and the European Commission.

1) Both the German and the Dutch legislator generally consult national stakeholders on the implementation of Directives. However, during this stage, the choice for a Directive has already been made, and amendments cannot be made to provisions in the Directive that national stakeholders or experts perceive as particularly problematic.

2) In European consultation, future action is already determined when consultations are initiated, which guarantees that future action is not based on the responses to consultations.

The clearest example is the 2010 Green Paper on policy options towards progress towards a European contract law, discussing various possible uses for a final CFR. It may be doubted what weight is given to the preferences of stakeholders for the different options sketched in the Green Paper. Although the consultation lasted from July 2010 to February 2011, the Expert Group working on a "feasibility study"[1006] that would be used to decide which parts of the DCFR were to be used for a Common Frame of Reference was already appointed in April 2010.[1007] Although the Green Paper duly stated that the Expert Group would study the feasibility of an instrument of European contract law,[1008] and that further action by the Commission in 2012 would depend on the evaluation of the responses to the Green Paper,[1009] the Commission seemed to favour the fourth option set out in the Green Paper, the optional instrument of a European contract code, in the form of a Regulation, and pointed out significant disadvantages associated with the other six options.[1010] This preference was also

[1003] See for example the Communication from the Commission to the Council and the European Parliament on European contract law, COM (2001) 398 final, the Communication from the Commission to the European parliament and the Council, European contract law and the revision of the acquis: the way forward, Com (2004) 651 final, European Commission, Green Paper on the Review of the consumer acquis, COM (2006) 744 final, and most recently the European Commission, Green Paper on policy options for progress towards a European contract law for businesses and consumers, COM (2010) 348 final.
[1004] See, for example, the February issue of the European Review of Contract Law 2011, or the collection of essays on the Green Paper on policy options for progress towards a European contract law for businesses and consumers, COM (2010) 348 final, M.W. Hesselink et al. (eds.), *Het Groenboek Europees contractenrecht: naar een optioneel instrument?*, The Hague: BJU 2011.
[1005] L.A.J. Senden, 'De lidstaten en de kwaliteit van Europese wetgeving: geen consumenten, maar co-actoren', *SEW* 2006, p. 55.
[1006] Comp. the criticism of E. Clive, 'European contract law feasibility study', *European private law news*, 11 May 2011available at http://www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=8658 (consulted 26 August 2011): ' "Feasibility study" is a nice, neutral, non-committal name which did not, however, feature in the group discussions at all and which is not very accurate because this text is not a study about the feasibility of anything. The only doubt about feasibility within the expert group was whether a text could be produced within the limited time available. The text could be used as a partial basis for discussions about what might be feasible politically, but that is something different.'
[1007] Commission Decision of 26 April 2010, OJ L 105, 27.4.2010, p. 109.
[1008] Green Paper on policy options for progress towards a European contract law for businesses and consumers, COM (2010) 348 final, p. 4.
[1009] Green Paper on policy options for progress towards a European contract law for businesses and consumers, COM (2010) 348 final, p. 2.
[1010] Comp. also V. Reding, 'Warum Europea ein optionales Europäisches Vertragsrecht benötigt', *ZEuP* 2011, p. 1.

expressed by the European Parliament.[1011] This preference for an optional instrument is also visible in the Digital Agenda for Europe,[1012] where the Commission indicates that one of the actions to be undertaken is the formation of an optional instrument of European contract law. Accordingly, the Expert Group has worked 'on the assumption of an optional instrument'.[1013] The clearly expressed preference of the Commission for a particular option may, according to Howells,[1014] have limited the amount of responses.

3) Consultations at the European level have narrowed debate.

Consultations typically do not discuss all possible options, but focus on a limited number of options that are the focus of subsequent debate. Consequently, other options may be overlooked. For example, the 2007 Green Paper on the review of the consumer *acquis*[1015] discusses the degree of harmonisation, proposing either full harmonisation, minimum harmonisation, or minimum harmonisation combined with a mutual recognition clause, while not discussing other options, such as optional harmonisation that gives businesses the option to apply either national or European law, or partial harmonisation that establishes two sets of rules, but does not leave businesses involved in cross-border trade with the option to apply national laws to their contracts.[1016] Both degrees of harmonisation are aimed at harmonising the law for cross-border trade, and not the law applicable to domestic trade.[1017]

Furthermore, the 2007 Green Paper proposes the different degrees of harmonisation as opposites, overlooking the possibility to combine minimum and maximum harmonisation, as is for example the case in Directive 2006/114 on misleading and comparative advertising. Typically, the options suggested in consultations in European private law include options that are not feasible or not likely to contribute to solving the problem signalled in the consultation. A clear example of this is the 2001 Green Paper on European contract law, which proposes four options to improve the private law *acquis*. The first option, no European action, is not likely to improve the private law *acquis*, while the fourth option, comprehensive legislation at a European level, is not politically feasible. Unsurprisingly, a considerable majority of the consulted parties preferred the remaining options 2 and 3.[1018]

Green Papers may also steer towards an option preferred by the Commission. Thus, the outcome of consultations may be affected by the questioning techniques used in consultations. Rutgers and Sufton-Green[1019] find that the 2007 Green Paper on the reform of the consumer law *acquis* suggests several courses of action, one of which is the formation of an optional instrument,

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[1011] Resolution P7_TA-PROV(2009)0090 of the European Parliament of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme, par. 99-100.

[1012] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee and the regions, *A digital agenda for Europe*, COM (2010) 245 final, p. 13. See similarly Communication from the Commission, *Europe 2020, A strategy for smart, sustainable and inclusive growth*, COM (2010) 2020 final, p. 21.

[1013] Expert Group on a Common Frame of Reference in European contract law, *Synthesis of the fourth meeting*, 1-2 September 2010, available at http://ec.europa.eu/justice/policies/consumer/docs/cfr_report_10_09_01_02_en.pdf, p. 1.

[1014] G. Howells, 'European contract law reform and European consumer law – Two related but distinct regimes', *ERCL* 2011, p. 175: 'one might even portray the present consultation as rather cosmetic given the emphasis placed in day to day discussions on the Optional Instrument. Indeed there is a danger that the Commission may not receive as full a range of responses as otherwise might have been the case for many commentators may believe the only realistic option on the Commission's agenda is the Optional Instrument. Subtly the debate has been manipulated implicitly to assume there will be an Optional Instrument and so the focus debate is on its nature, scope and content and relationship with private international law.'
. See also K. Riesenhuber, 'A competitive approach to EU contract law', *ERCL* 2011, p. 124-125. Similarly R. Zimmerman, 'Europäisches Privatrecht – Irrungen, Wirtungen', *Max Planck Private Law Research Paper* 2011, p. 24-25, who finds the consultation 'einem leeren Legitimationsritual'.

[1015] COM (2006) 744 final, par. 4.5.

[1016] See on the different options P.J. Slot, 'Harmonisation', *ELR* 1996, p. 383-384.

[1017] D. Curtin, 'Emerging institutional parameters and organised difference in the European Union', in: B. de Witte, D. Hanf, E. de Vos (eds.), *The many faces of differentiation in EU law*, Intersentia: Antwerp 2001, p. 363-364, remarks that optional harmonisation has been used predominantly to further the free movement of goods, and should be seen within that context. Nevertheless, she recognises that partial harmonisation, which has also been used to adopt measures under article 114 TFEU, could perhaps be successfully used in other areas.

[1018] Comp. the Commission's summary of the reactions to the communication on European contract law, available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/summaries/sum_en.pdf.

[1019] J.W. Rutgers, R. Sufton-Green, 'Revising the consumer *acquis*: (Half) opening the doors of the Trojan Horse', *ERPL* 2008, p. 431.

subsequent questions concern the horizontal instrument, and other questions are not discussed. Thus, the questioning style of the Green Papers, already favouring a particular course of action, does not seem to be structured in a way most suitable to receive suggestions on what particular grounds private law could or should be harmonised.

4) Consultations do not consult all relevant parties.

This means that respondents who may have valuable insights on the use of a particular technique or who may suggest alternative techniques are not consuled. Thus, neither the Dutch consumers' association ('*Consumentenbond*') nor the German consumer protection association ('*Deutscher Verbraucherschutzverein*') separately participated in the consultation preceding Directive 2011/83 on consumer rights.[1020]

Consultations are currently used in a way that does not aim at generating the maximum amount of input. Accordingly, both Senden[1021] and Zimmerman[1022] have doubted the added value of especially European consultations.

8.2.1.3. Improving the use of consultations

The use of consultations may be improved if shortcomings currently visible in the private law acquis are remedied. Moreover, additional measures may further enhance the quality of consultations:

1) Organising consultations in addition to European consultations preceding the drafting of Directives.

Neither the Dutch nor the German legislator has chosen to organise consultations in addition to European consultations. In the German legal order, however, European consultations may sometimes be announced in legal journals.[1023] In the Dutch legal order, the legislator may organise closed consultations prior to its reaction to European initiatives, in particular obtaining advice from the Commission for Consumer Affairs ('*Commissie voor Consumentenaangelegenheden*', 'CCA').[1024] However, the CCA has not participated in the debate at a European law. The German approach seems somewhat more successful when comparing the participation of German and Dutch actors in the debate at the European level.[1025] A valuable example is set by the English legislator, who generally initiates consultations on European proposals.

[1020] See the responses at http://ec.europa.eu/consumers/rights/responses_green_paper_acquis_en.htm. The Consumentenmbond is a member of BEUC and may have contributed to the BEUC response to the consultation, but this is not apparent from the response as such. Interestingly, Thuiswinkel.org which has established a successful trust mark, has criticised withdrawal and refund obligations (see http://www.thuiswinkel.org/thuiswinkel.org-wants-to-get-rid-of-two-consumer-rights).

[1021] L.A.J. Senden, 'De lidstaten en de kwaliteit van Europese wetgeving: geen consumenten, maar co-actoren', *SEW* 2006, p. 55.

[1022] R. Zimmerman, 'Europäisches Privatrecht – Irrungen, Wirtungen', *Max Planck Private Law Research Paper* 2011, p. 24-25.

[1023] Comp. for example the announcement on the consultation on the doorstep selling Directive, *EuZW* 2007, p. 748, or the announcement of the consultation on collective enforcement, *NZG* 2011, p. 295

[1024] Comp. the CCA advice on unfair commercial practices, *Oneerlijke handelspraktijken op consumententerrein in de EU*, 13 April 2004, Report 04/06, avilable at http://www.ser.nl/nl/publicaties/adviezen/2000-2007/2004/b22670.aspx or the report on consumer rights, Consumentenrechten in de interne markt, 17 June 2009, 09/05, available at http://www.ser.nl/~/media/DB_Adviezen/2000_2009/2009/b27871.ashx. It is not the only organisaiton that may be consulted. Alternatively, the Expert Centre on European Law (Expertisecentrum Europees Recht) has provided a 2008 report on the CFR, available at http://www.minbuza.nl/ecer/icer/zoeken-in-icer-adviezen/2008/2008--rapport-common-frame-of-reference.html.

[1025] Comp. the responses to COM (2006) 744 final, at http://ec.europa.eu/consumers/rights/responses_green_paper_acquis_en.htm, where clearly, (much) more Grman than Dutch stakehodlers participated, or, similarly, the particpation in the reform of Directive 94/47 on timeshare, avalaible at http://ec.europa.eu/consumers/cons_int/safe_shop/timeshare/consultation2006_en.htm, as well as the participation in the consultation on an optional insturment, COM 92010) 348, availabel at http://ec.europa.eu/justice/newsroom/contract/opinion/100701_en.htm.

2) Establishing an obligation for the Commission to account how the outcomes of a consultation have been taken into account in the action undertaken after a consultation.

This obligations should be included in the Interinstitutional Agreement on better lawmaking, which currently states that the Commission will take into account the results from consultations.[1026]

3) Opening national consultations to participation from memers of the European Parliament.

Members of the European Parliament may be well placed to participate in national consultations, because of their expertise on European matters and their national political experiences. Participation of actors with both a national and a European background may prevent incorrect implementation and maybe increase the chance that an implementation law is judged as "best practice" and may serve as inspiration to other actors.

4) Encouraging national Parliaments to participate in European consultations

The Protocol on the application of the principle of subsidiarity and proportionality to the TFEU may provide national Parliaments with a possibility to engage more actively in the development of the consumer law *acquis*. Notably, national Parliaments have already delivered opinions on recent initiatives in European private law, especially the proposal for a Regulation establishing a European contract law.[1027] It will be interesting to see whether some national Parliaments in particular provide frequent opinions, and to look at the possibilities to encourage less active national Parliaments to adopt an active approach as well.

5) Using separate consultations on future action and legislative proposals.

Sandström[1028] has argued that consultations should include draft of proposed legislation, as this may provide an opportunity for consulted parties to address all relevant points. This argument does however raise the question whether it would not be useful to distinguish the course of action to be adopted first, and to subsequently consult on a specific legislative proposal that includes the draft proposal, as Green Papers in European private law now seek to answer both questions in one consultation.

6) Promoting the better circulation of consultations

It would be interesting to gain insight in the way that for example Green Papers are circulated.[1029] The promotion tactics exercised at the European level may not be as successful as national practices. Consequently, national legal practitioners may not be aware of the consultations issued by the Commission. Possibly, successful national practices to spread policy documents could be taken as a starting point to reach legal practitioners.

7) Providing more opportunities for responses to consultations

In this regard, the initiative to extend the minimum period of consultations from 8 to 12 weeks[1030] should be welcomed. The introduction of an alert service[1031] should in addition ensure that actors who sign up for that service will be made aware of subsequent consultations in their field.

[1026] OJ C 321/1, 31 December 2003, par. 12.
[1027] See for an overview of the reaction of Parliaments http://www.ipex.eu/IPEXL-WEB/dossier/dossier.do?code=COD&year=2011&number=0284&appLng=EN.
[1028] G. Sandström, 'Knocking EU law into shape', *CLMRev* 2003, p. 1310.
[1029] L. Senden, *Soft law in European Community law*, Hart: Oxford 2004, p. 126 notes that one of the weaknesses of the Green Papers is that they do not provide insight into the ways in which they are circulated, stating: 'one may wonder whether Green Papers that are silent on this particular aspect are notified to interested parties at all'.
[1030] European Commission, 'Have a bigger say in European policy-making: Commission extends public consultations to twelve weeks and creates new alert service', *Press Release European Commission* 3 January 2012, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/1&format=HTML&aged=0&language=EN&guiLanguage=en.
[1031] See http://europa.eu/transparency-register/index_en.htm.

These measures would significantly increase the chance that relevant actors become aware of consultations. Remedying the shortcomings in the current use of consultations and improvements, some of which have already been made, may also make it more likely that actors will subsequently respond to consultations.

8.2.1.4. Conclusion on the use of consultations

The shortcomings in the current use of consultations may have contributed to the separate debates on private law at the national and the European level. In particular, the lack of interaction between European and national actors may help to maintain the seperation between national and European debate, which in turn makes it more likely that actors will continue to overlook increasing interdependence Thus, if consultations encourage European and national actors to interact more and take into account one another's responses, this may benefit the use of codifications and blanket clauses in the multilevel legal order. Specifically, if European actors become aware of national experiences and problems in the implementation and applicaton of Directives, this may prompt European actors to provide more clarity on the meaning of concepts used in Directves and encourage national actors to compare strategies to the implementation of Directives. More awareness of problems at the national level should also prompt European actors to reconsider the use of blanket clauses in the private law *acquis*, consider the need for responsiveness at the national level, and provide more clarity on the allocation of competences between the CJEU and national courts. If national actors interact more with European actors, this may make them more aware of future initiatives for harmonisation, or they may lobby for more clarity on future European measures. National actors may also anticipate the development of the *acquis*.

The suggestions for improvement make the interdependence between actors apparent. Notably, national actors may compensate for shortcomings in European consultations, and European actors should rely more on national actors to ensure that relevant actors are consulted. However, the efforts of national actors have little added value if European actors do not take actors´ responses into account. Simultaneously, European actors may compensate for shortcomings in national consultation practices and sugest improvement.

8.2.2. Impact assessments

Impact assessments are a relatively new technique used at the European level that still has to develop further.[1032] According to the Commission,[1033] impact assessments are not meant to replace political decision-making. Instead, they are aimed to further decision-making based on 'transparent, comprehensive and balanced evidence'.[1034] Notably, however, RIA's are not binding and do not diminish the discretion of the Commission to initiate harmonisation. [1035] To what extent can impact assessments contribute to the predictability and responsiveness of the private law *acquis*?

[1032] A.C.M. Meuwese, *Impact assessment in EU lawmaking*, KLI: Alphen aan den Rijn 2008, p 11.
[1033] *Communication from the Commission on impact assessment*, COM (2002) 276 final, p. 3.
[1034] European Commission, *Impact assessment guidelines*, 15 January 2009, SEC (2009) 92, p. 4.
[1035] Comp. CJEU 13 May 1997 (Federal Republic of Germany v European Parliament and Council), C-233/94, [1997] ECR, p. I-2405, par. 56. A.C.M. Meuwese, *Impact assessment in EU lawmaking*, KLI: Alphen aan den Rijn 2008, p. 160-162 finds that CJEU 7 September 2006 (Spain v Council), C-310/04, [2006] ECR p. I-7285 could be a sign that the CJEU will take more note of RIA's. However, as Meuwese also points out, this concerns a case in which an impact assessment had not been made, which led the Advocate General and the Court to doubt whether the Commission could have made proper use of its discretion as it

Paragraph 8.2.2.1. will discuss the shortcomings in the current use of impact assessments and paragraph 8.2.2.2. will turn to starting points to improve the use of impact assessments. Paragraph 8.2.2.3. will end with a conclusion.

8.2.2.1. Shortcomings in the use of impact assessments

Various serious shortcomings are currently visible in the use of impact assessments in the private law *acquis*:

1) Impact assessments assess the impact of the options suggested in consultations, even though these options are hardly exhaustive. Consequently, problems signalled in the impact assessment may be dealt with in other ways that have not been assessed.

For example, impact assessments, before the proposal for a Regulation establishing a Common European Sales Law, did not include optional harmonisation in its analysis.[1036] Also, if consumers think they are more likely to become a victim of fraud when entering into cross-border contracts, especially via Internet, a service like Pay Pall might further consumer confidence, as it guarantees consumers a refund if, for example, they have not received the product they bought or if the product is not in accordance with the contract.[1037] Similarly, Van Boom[1038] points out that the argument that consumer confidence is furthered by more harmonisation may be more effectively pursued by other techniques, such as inserting standard clauses in often used contracts.

Even if stakeholders suggest alternative measures, these have not been considered in impact assessments. Accordingly, the suggestion of stakeholders to introduce professional licensing requirements in timeshare matters was not assessed. The reasoning for this choice are interesting:[1039]

> 'The minimum intervention priority induced the elimination of the sub-option of professional licensing requirements in the proposal for a revised Directive, despite the merits of this sub-option, and strong support from numerous Member States and stakeholders. When weighing the benefits for consumers of introducing the licensing requirements sub-option, and the additional regulatory burden it would impose on the industry, it was concluded that, on balance, the benefits did not, at this stage, justify this measure.

It can however be doubted whether this 'minimum requirement principle' – which in the form of the principles of subsidiarity proportionality should not only be taken as a starting point for only one option and which does not seem to have led to reconsideration of the maximum harmonisation approach – justifies the exclusion of this option. Arguably, licensing may well be suitable to achieve the objective pursued by the European Union, especially limiting the amount of rogue traders, which, in time, may contribute to consumer confidence. One may also ask whether impact assessments are not meant to analyse the benefits and disadvantages of a particular option. Apparently, however, it is also possible to reject an option without such an analysis. In addition, the report appears to contradict itself by stating that the option to introduce licensing requirements receives strong support, while previously

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was not sufficiently familiar with all relevant facts. If an impact assessment has been conducted, the CJEU may continue to exercise restraint – it is not clear whether shortcomings in impact assessments discussed below will prompt a more critical approach.

[1036] The European Economic and Social Committee, 'The 28th regime – an alternative allowing less lawmaking at Community level', OJ 2011, C 21/26, 21.2.2011, par. 1.14 has suggested to include this option in future impact assessments.

[1037] See for the full terms and conditions (in Dutch) https://cms.paypal.com/nl/cgi-bin/?&cmd=_render-content&content_ID=ua/UserAgreement_full#13.%20PayPal%20Buyer%20Protection.

[1038] W.H. van Boom, 'The Draft Directive on consumer rights: Choices made and arguments used', *Journal of Contemporary European Research* 2009, p. 462.

[1039] Commission staff working document, *Accompanying document to the proposal for a Directive of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange, Impact assessment*, COM (2007) 303 final, p. 37.

admitting that there were few responses of stakeholders on this point. However, an explanation for a small amount of responses may also be that the consultation never asked after this possibility.[1040]

2) Impact assessments are based on controversial assumptions that are however essential for the outcome of the assessment.

Accordingly, impact assessments generally assume that divergences between private laws pose an obstacle to the internal market.[1041] However, this assumption overlooks that the assumption that especially default private law poses a barrier to the internal market is quite controversial.[1042] This assumption is also difficult to reconcile with the *Tobacco Advertising*,[1043] where the CJEU held that the existence of divergences and the abstract risk of obstacles to the internal market do not by themselves justify harmonisation. Moreover, impact assessments do not make use of insights that draw into doubt that divergences between private laws always present an obstacle to cross-border trade, or present the most pressing obstacle to cross-border trade.[1044]

Notably, previous legislation was also not based on impact assessments. For example, in the proposal for Directive 97/7 on distance selling,[1045] the Commission relies on data provided by stakeholders and seems to assume, rather than investigate, that divergences of national laws provide an obstacle to the internal market: 'It is the Commission's job to avoid such fragmentation.'[1046] An impact assessment on the impact of divergent private laws on the internal market is long overdue.

3) Impact assessments are superficial and do not sufficiently take into account elements that are relevant for the outcme of the assessment.

A good example is the impact assessment accompanying the CESL, which does not compare the impact of alternative optional instruments that would, for example, also deal with complex contracts containing elements of manufacturing, finance, and transport. The current limitation of the CESL to sales contracts and the exclusion of mixed contracts in article 5, 6 and article 2 (m) proposed Regulation means that parties to often-used complex contracts are less likely to opt for the CESL, as it would only cover the 'sales' part of the contract and not the parts of the contract relating to, for

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[1040] Comp. the consultation document, available http://ec.europa.eu/consumers/rights/travel_en.htm#time.

[1041] See for example recently European Commission, *Commission staff working paper, Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, 2011, available at http://ec.europa.eu/justice/contract/files/1_en_impact_assesment_111011.pdf, p. 10, the Commission Staff Working Document, *Accompanying document to the proposal for a Directive of the European Parliament and Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange, Impact Assessment*, COM (2007) 303 final, p. 24. See, somewhat more extensively, the Commission Staff Working Paper, *Extended Impact Assessment on the Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market*, COM (2003) 356 final, p. 5-8,

[1042] M. Schillig, *Konkretisierungskompetenz und Konkretisierungsmethoden im Europäischen Privatrecht*, De Gruyter Recht: Berlin 2009, p. 294, Study Group on Social Justice in European Private Law, 'Social justice in European contract law: A Manifesto', *ELJ* 2004, p. 656, McKendrick, 'Harmonisation of European contract law: The state we are in', in: S. Vogenauer, S. Weatherill (eds.), *The harmonisation of European contract law*, Hart: Oxford 2006, p. 21, O. Remien, Denationalisierung des Privatrechts in der Europäischen Union?', *Zeitschrift für Rechtsvergleichung* 1995, p. 129-130, H. Beale, 'Finding the remaining traps instead of unifying contract law', in: S. Grundmann, J. Stuyck (eds.), *An academic green paper on European contract law*, KLI: The Hague 2002, p. 67-72, H. Collins, 'Transaction costs and subsidiarity in European contract law', in: S. Grundmann, J. Stuyck (eds.), *An academic green paper on European contract law*, KLI: The Hague 2002, p. 270-271, G. Wagner, 'The virtues of diversity in European private law', in: J.M. Smits (ed.), *The need for a European contract law*, Europa Law Publishing: Groningen 2005, p. 17-18.

[1043] CJEU 5 October 2000 (Federal Republic of Germany v European Parliament and Council of the European Union), C-376/98, ECR [2000], p. I-8419, par. 84.

[1044] J.M. Smits, 'Diversity of contract law and the European internal market', in: J.M. Smits (ed.), *The need for a European contract law*, Europa Law Publishing: Groningen 2005, p. 169-170. Smits, at p. 171, also points out that the effect of uniform law on contracting is scarce. Similarly, E. Kieninger *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt*, Mohr Siebeck: Tübingen 2002, p. 86-87 remarks that the choice to start business in a particular market may be influenced more by factors like a potential market for a product, availability of employees, infrastructure, or tax law than diverging private laws.

[1045] European Commission, *Proposal for a Directive on distance selling*, COM (92) 11 final, p. 3-5. Although the Commission refers to 'recent study'(p. 5) and 'detailed study' (p. 7) it does not become clear what the subject of these studies was or by whom it was performed, which makes it difficult to retrieve these studies. I can find no impact assessment empirically underpinning the arguments of the Commission that fragmentation of laws hinders the internal market.

[1046] European Commission, *Proposal for a Directive on distance selling*, COM (92) 11 final, p 11.

example, manufacture, transport, finance and installation.[1047] Arguably, inserting such provisions into an optional instrument may significantly affect the added value of an optional instrument to parties to complex contracts, which in turn may significantly affect the chances of success of the CESL. Consequently, the impact assessment fails to point out which content of an optional instrument is most likely to generate optimal impact for the internal market.

Frequently, also, impact assessments may also overlook other relevant factors that may affect the success of a new or reformed Directive. In particular, the question arises whether impact assessment pay sufficient attention to the possibility that parties upon whom rights are conferred – in particular consumers – are sufficiently aware of these rights and consequently enforce these rights. Generally, the possibility that a party *can* enforce his rights may serve as an additional incentive for other parties to meet their obligations under private law – thus, the *possibility* of enforcement may have a preventive function in itself.[1048] Yet characteristically, the enforcement of private law depends on private parties. Thus, if private parties do not enforce their rights, this may lead to a lack of case law and literature discussing this case law. Thus, a lack of information of the development and application of rules in legal practice may arise.[1049] Consequently, rules that do not respond to the needs of legal practice, or society's views on justice, or rules that are circumvented because they give rise to problems of unpredictability and inconsistency, or rules that are not accessible, may continue to exist because of a lack of information of these problems. Arguably, this may be a reason to exercise some caution in the conclusions of impact assessments: possibly, the failure of a rule to visibly advance the internal market may not necessarily be due to, for example, minimum harmonisation, but also because parties have not enforced their rights, which in turn can be due to multiple reasons: consumers were already satisfied with the service provided by sellers, or they were unaware of their rights. Alternatively, they may suffer only limited damage that does not outweigh litigation costs.[1050]

Because of these shortcomings, impact assessments currently do not contribute to evidence-based interaction between actors, which should be one of the important advantages associated with impact assessments.[1051] Instead, impact assessments may undermine debate, as they generally support harmonisation rather than debate on the desirability of harmonisation, or debate on the possible ways to address problems for the internal market. Impact Assessment Reports frequently present rather exact transaction costs and percentages[1052] that provide a false sense of exactness which may inhibit further debate.

[1047] Comp. the response of the British Exporters Association to the Feasibility Study, available at http://ec.europa.eu/justice/contract/expert-group/index_en.htm, p. 2, under 8.

[1048] H.J. Snijders, C.J.M. Klaassen, G.J. Meijer, *Nederlands burgerlijk procesrecht*, Kluwer: Deventer 2007,4th ed., par. 11, rightly note that the preventive effect may also be a disadvantage, especially if it has a greater effect on a party with less financial resources and expertise than the party he contracts with.

[1049] Notably. a large amount of case law does not necessarily mean that a particular rule is problematic – rather, especially blanket clauses need to be interpreted taking into account all the relevant circumstances in individual cases, while a lack of case law need not necessarily mean that a provision is not of importance to legal practice, see for Dutch law recently A.S. Hartkamp, 'Het nieuwe BW – ontwikkelingen sinds 1992', *AA* 2012, p. 49, referring to the interpretation of article 6:162 par. 2 BW as well as the supplementary function of good faith in article 6:248 BW in HR 12 January 2001, *NJ* 2001, 253 and HR 12 december 2003, *NJ* 2004, 117.

[1050] See further also W. van Boom, *Efficacious enforcement in contract and tort*, BJU: The Hague 2006, who has identified various features of contract law that may stand in the way of the effective enforcement of contract and tort law, which may be particularly problematic if these rules pursue a specific aim.

[1051] W.H. van Boom, 'The Draft Directive on consumer rights: Choices made and arguments used', *Journal of Contemporary European Research* 2009, p. 460.

[1052] See for example the European Commission working staff document, accompanying the proposal for a directive on consumer rights, Impact Assessment Report, p. 9-12, available at http://ec.europa.eu/consumers/rights/cons_acquis_en.htm. These predictions seem rather perilous to begin with and moreover have already been challenged by stakeholders, see Oxera, *What is the impact of the proposed Consumer Credit Directive?*, April 2007, available at http://www.oxera.com/cmsDocuments/Oxera%20report%20on%20CCD%20April%202007.pdf (study commissioned by APACS, the British Bankers' Association, the Consumer Credit Association and the Finance & Leasing Organisation.) See for example also the claim of Open Plus that the new Directive will impose around € 10 billion on retailers, see http://www.openplus.co.uk/news/new-eu-law-will-cost-e-retail-consumers-10-billion/.

8.2.2.2. Improving the use of impact assessments

Despite shortcomings in the use of impact assessments, the European Commission has not critically considered the use of impact assessments in the development of the private law *acquis*.[1053] Nevertheless, the use of impact assessments can be improved if shortcomings are addressed and if measures for improved impact assessments are taken:

1) Impact assessments should accompany general consultations on future action and precede legislative proposals.

Thus, impact assessments are able to critically evaluate the need for proposed legislation, critically test assumptions, and go beyond the options suggested in consultation documents.

2) Actors participating in European consultations should take impact assessments into account.

More attention for impact assessments may pressure European actors to improve the use of impact assessments. The Roadmap service[1054] should contribute to the awareness of actors of planned impact assessments as well as facilitate getting an overview of the wide range of European Commission initiatives.

3) National actors should consider carrying out separate impact assessments.

Senden[1055] has suggested that impact assessments should also be held at the national level. Arguably, national impact assessments will enable a clearer view on the impact of the reform of contract law on national markets, which may lead to more 'evidence-based' debate.

8.2.2.3. Conclusion on the use of impact assessments

This paragraph has considered whether the use of impact assessments strengthens the legislative processes, which in turn could benefit the use of blanket clauses. Impact assessments currently hinder rather than help interaction between actors. These shortcomings should not be seen in isolation from the shortcomings in the use of blanket clauses by the European legislator. The shortcomings in impact assessments are unfortunate, as impact assessments are a suitable means to draw attention to the question which techniques should be used in the development of private law. Perhaps, a more critical approach of the use of techniques would have encouraged both national and European actors to use blanket clauses more sparingly. However, if the shortcomings in impact assessments are remedied, and if measures to improve impact assessments are taken, impact assessments may still provide a valuable contribution to the debate by focusing on the use of techniques. More critical and thorough impact assessments would hopefully also lead to more specific guidelines when differences in national private laws could pose barriers to the internal market, and thus indicate on what areas of law the Union is likely to pursue harmonisation, thereby furthering the predictability of harmonisation and limiting the arbitrariness of harmonisation.[1056]

[1053] The House of Lords European Union Committee, *Impact Assessments in the EU: room for improvement?*, available at http://www.parliament.the-stationery-office.co.uk/pa/ld200910/ldselect/ldeucom/61/6106.htm, 2009-10, par. 66 has moreover pointed out that early drafts of impact assessments and draft Directives are not generally available, which makes it more difficult to estimate the influence of these documents on one another during the drafting process.

[1054] See http://ec.europa.eu/governance/impact/planned_ia/planned_ia_en.htm.

[1055] L.A.J. Senden, 'General Report, The quality of European legislation and its implementation and application in the national legal order', in: E.M.H. Hirsch Ballin, L.A.J. Senden (eds.), *Co-actorship in the development of European law-making'*, TMC Asser Press: The Hague 2005, p. 157.

[1056] J.M. Smits, 'European private law: A plea for a spontaneous legal order', in: D.M. Curtin, J.M. Smits (eds.), *European integration and the law*, Antwerp 2006, via www.ssrn.com, par. 6.

8.2.3. Networks

Networks are frequently well-developed in nation states and accordingly facilitate interaction between various actors involved in the development of private law. Networks may be used to create discussion outside of the legislative process, but their role in facilitating debate in the legislative process can be essential and often, actors simply rely on networks in the development of private law. In the multilevel legal order, networks are not as well-developed, while there is more need for interaction between actors as interdependence develops further. How can the use of networks contribute to the legislative process, in particular the extent to which codifications and blanket clauses contribute to the comprehensiveness of European private law?

Paragrah 8.2.3.1. will consider the use of current networks and paragraph 8.2.3.2. will discuss shortcomings in the use of networks. Paragraph 8.2.3.3. will turn to the improved use of networks and paragraph 8.2.3.4. will end with a conclusion.

8.2.3.1. The current use of networks

Generally, the scope and function of networks differ widely from one another. Initiatives may range from cross-border cooperation between specific institutes,[1057] to well-established national networks.[1058] At the European level, different forms of networks have also developed, ranging from SECOLA,[1059] to for example the Network of the Presidents of the Supreme Judicial Courts of the European Union.[1060] Both European and national state actors have recognised the added value of networks in the devlopment of private law. Thus, when initiating legislation, Member States may rely on national networks that provide input on, for example, a bill, inclusing implementation legislation, and prompt debate. The European Commission has similarly attempted to collect input on its initatives through consultations. Generally, networks facilitate targeting actors with relevant expertise and experience who could contribute to the quality of private law.

8.2.3.2. Current shortcomings in the use of networks

What shortcomings are currently visible in the use of networks?

1) Generaly, networks have failed to sufficiently facilitate and interest members in entering into debate across borders and across levels.

Parties involved in national legal practice or research and education do not necessarily also participate in networks at the European level. Consequently, a separation exists between debate on national private law on the one hand, where discussion takes place between national actors, through well-established national networks, and literature, taking national statutory and case law as a starting point.

[1057] For example the Deutsch-Russische Juristenvereinigung e.V. (DRJV), or cooperation between universities in different legal orders,

[1058] For example, the Dutch Lawyers' Society ('*Nederlandse Juristen Vereniging*' see http://njv.nl/), as well as the Dutch Society on Private Law ('Nederlandse Vereniging voor Burgerlijk Recht', see http://www.verenigingvoorburgerlijkrecht.nl/), the Netherlands Comparative law Association ('Nederlandse Vereniging voor Rechtsvergelijking, see http://www.ejcl.org/general/nvvrhome.html), the Council for the Judiciary ('Raad voor de Rechtspraak, see http://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/OverDeRvdr/Pages/default.aspx), and the Dutch Bar ('*Orde van Advocaten'*, see http://www.advocatenorde.nl/consumenten/).

[1059] See further http://www.secola.org/.

[1060] See further http://www.rpcsjue.org/.

European law generally takes a less prominent position.[1061] On the other hand, debate on 'European' private law, which includes the development of the private law *acquis*, the desirability of further harmonisation, and the interaction between European and national private law, takes European law and questions whether national private laws diverge as a starting point, where prominent "European" stakeholders may play an important role.[1062] Grundman and Stuyck[1063] state that:

> 'The attendees [of the 2001 SECOLA conference] (…) represent the academic circles with a strong interest in the Europeanisation of private law. These circles, however, encompass probably not more than 10-20 per cent of private law scholars in the Member States (….)Therefore, the reservations which have been made against more intensive unification or in favour of maintaining elements of flexibility and diversity by a large majority even in this forum in Leuven have to be taken very seriously. It is not impossible that the majority view in legal academia in general could go in a direction more or less opposite or less favourable to any more harmonisation or unification.'

More generally, Schepel and Wesseling[1064] have also emphasised the 'homogeneity of the European legal community. Also, Armstrong[1065] has noted that the emphasis of the Commission on including "civil society" in the White Paper on European governance seems to emphasise transnational actors, which moreover seems aimed at supporting European legislation.

2) Stakeholders who can easily organise themselves may participate more prominently in networks than weaker stakeholders. Thus, the formation of networks does not necessarily encourage *inclusive* debate.

3) European actors take European networks as a starting point instead of turning to national networks.

Arguably, European networks should not be used as an alternative to various national networks, but as a supplement to national networks, and make use of the contacts established in these national networks. Arguably, national state actors are best placed to involve actors in debate on European legal reform.[1066] State actors may also be better placed than actors at the European or international level to recognise important actors and well-established, representative stakeholder groups at the national level.

The development of multiple networks which apparently overlap may lead to confusion. This becomes apparent in Directive 2013/11 on ADR in consumer disputes,[1067] which envisages an important role for the European Consumer Centres-network, and also notes that ADR organisations should be encouraged to join FIN-NET with regard to ADR in financial services. However, the existence of the European Extra-Judicial network may also create some confusion, as the division of tasks between the EEJ-net and the ECC-net, as well as the relationship between these two networks,

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[1061] Comp. S. Prechal, R.H. van Ooik, J.H. Jans, K.J.M. Mortelmans, 'Europeanisation of the law: Consequences for the Dutch judiciary', Report of October 2005, available at http://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/WetenschapsOnderzoek/Overzichtonderzoeksprojecten/Europeanisering/Pages/default.aspx, p. 49-50.

[1062] For example, the formation of the Optional Instrument (see for the members of the stakeholder group http://ec.europa.eu/justice/contract/stakeholder-meeting/index_en.htm), Directive 2011/83 on consumer rights (see for the members of the stakeholder group http://ec.europa.eu/consumers/rights/cons_acquis_en.htm). Comp. also the members of the Round Table on Travel Contracts, on the review of Directive 90/314 on package travel (see for the members of the group http://ec.europa.eu/consumers/cons_int/safe_shop/pack_trav/pack_trav03_en.pdf)

[1063] Comp. the observation of S. Grundmann, J. Stuyck, 'An academic Green Paper on European contract law – Scope, common ground and debated issues', in: S. Grundmann, J. Stuyck, (eds.), *An academic Green Paper on European contract law*, KLI: The Hague 2002, p. 7-8.

[1064] H. Schepel, R. Wesseling, 'The legal community: Judges, lawyers, officials and clerks in the writing of Europe', *ELJ* 1997, p. 165.

[1065] K. Armstrong, 'Rediscovering civil society: The European Union and the White paper on Governance', *ELJ* 2002, p. 116.

[1066] Comp. the European Union Select Committee, Correspondence with Ministers November 2007 to April 2008, Review of the consumer acquis, accessed at http://www.parliament.the-stationery-office.co.uk/pa/ld200910/ldselect/ldeucom/29/29250.htm#note133.

[1067] COM (2011) 793 final.

is not clear. This also makes it more difficult for national state actors to keep track of developments in these areas.

Thus, shortcomings in the debate in European private law can also be traced to shortcomings in the use of networks.

8.2.3.3. Improvements in the use of networks

The use of networks can be improved in various ways:

1) Networks should be more open to wider participation.

Networks may not be open to participation by all relevant actors, which may limit the extent to which these networks encourage inclusive, accessible and transparent debate. Important national networks may moreover require members to have a law degree from a university in that particular Member State,[1068] and discussions in networks are held in the language of the Member State, which may limit the extent to which foreign actors can participate in the debate in Member States. In some cases, cross-border networks have developed.[1069]

2) Actors should be made aware of relevant networks

Zimmerman[1070] argues that networks such as the European Law Institute[1071] should provide an overview of existing networks. In this way, a European Law Institute could contribute to keeping an overview of the different existing networks, forging contacts when the work of such networks could further debate in European private law, while making use of the memberships and contacts established in existing networks, instead of potentially creating confusion by replacing one network with another while actors may already be familiar with one network.

8.2.3.4. Conclusion on the use of networks

Currently, the use of networks does not facilitate debate on private law in the multilevel legal roder to the extent that they facilitate debate within Member States, even though more interaction between actors from different legal orders and different levels is necessary. Thus, networks currently do make actors involvd in legislative processs more aware of other actors also developing private law. The suggestions for improvement may encourage actors to look at foreign and European networks, while European actors should pay more attention to prominent national networks. However, the success of networks depends on the participation by relevant actors, and attempts to establish networks may not necessarily be successful, while it may take up considerable resources. Even if all relevant actors are participating in a network, this may not, necessarily, point towards a specific outcome.

8.2.4. Databases

The use of databases is important in facilitating “evidence-based” interaction between actors. Therefore, paragraph 8.2.4.1. will consider the current use of databases, and paragraph

[1068] This is the case for the Dutch Jurists’ Association (‘Nederlandse Juristen Vereniging’), see http://njv.nl/lidmaatschap/lid-worden/. The German Law Association (‘Deutscher Juristentag’) provides that foreign lawyers can become members if they are recommended by members, see http://www.djt.de/recht-mitgestalten/mitglied-werden/.
[1069] For example the Anglo-German Law Society, http://www.aglawsoc.org/ or the Asscociation for comparative legal studies in Belgium and The Nederlands (‘*Vereniging voor de vergelijkende studie van het recht van België en Nederland*’).
[1070] R. Zimmerman, ‘Reflections on a European Law Institute – based on the proceedings of the Florence Conference’, *ZEuP* 2010, p. 721.
[1071] See further http://www.europeanlawinstitute.eu/eli/index.php.

8.2.4.2. will consider shortcomings in the use of databases. Paragraph 8.2.4.3. will consider improvements in the use of databases and paragraph 8.2.4.4. will end with a conclusion.

8.2.4.1. The current use of databases

Databases are widely used in national legal orders as well as the European legal order. They provide actors with the necessary information to participate in debate based on adequate knowledge of the law. National databases provide one with information about relevant national and European legislation and (most) case law. At the European level, databases have been established within various European networks: from the well-known EU consumer law *acquis* database[1072] to the less-well-known and accessible search engine of national case law established by the Network of the Presidents of the Supreme Judicial Courts of the European Union.[1073] Thus, the scope and content of these databases varies: from widely available information on the implementation of the *acquis*, to information shared between courts.

8.2.4.2. Shortcomings in the use of databases

Currently, databases are not used optimally within the multilevel legal order:

1) Few databases on national decisions on the private law *acquis* have been established and the success of databases that do exist varies and is difficult to assess.

Whereas the CLABB-database was not well-known and abandoned after some years, the EU consumer law *acquis* database was used as a starting point to evaluate which Directives would be included in the review of the consumer *acquis*.

2) Decisions in ADR are not consistently published and may be confidential.

However, ADR becomes increasingly important in transnational trade and it is also encouraged by the European Commission.[1074] Therefore, an important source of information on the application of the law in individual disputes is missing.

3) Databases on the implementation of the *acquis* are established in addition to well-established national databases.

Accordingly, the European legislator has similarly recognised the added value of more information on the interpretation of the private law *acquis*, considering its proposal to collect information on the application of a future Regulation by both national courts and the CJEU in article 14 par. 2 Regulation for a Common European Sales Law. In addition, databases have also been established with regard to Directive 2005/29[1075] and in private international law.[1076]

Typically, national databases that are most often used do not provide one with information on foreign statutory law or case law implementing the private law *acquis*. Actors who are familiar with these databases will however not seek to rely on other databases without clear incentive to do so. Including decisions on the implementation of the acquis in national databases may increase the chance that actors will become more aware of these decisions.

It is however important to realise for what actors databases are established. For some actors, databases that are interesting for other actors may have little added value. For example, a database on the implementation of the *acquis* may have limited value for Member States. Generally, Member

[1072] Available at http://www.eu-consumer-law.org/.
[1073] see http://www.reseau-presidents.eu/rpcsjue/?lang=en.
[1074] COM (2011) 793 final.
[1075] See https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.home.show.
[1076] See http://ec.europa.eu/civiljustice/jure/login_en.cfm.

States simultaneously have to draft implementation legislation. By the time the database contains information on these implementation laws, most Member States will already have implemented the *acquis*, and therefore will not make use of a database providing information on the implementation of a Directive throughout the Union.[1077]

8.2.4.3. Improving the use of databases

The use of databases can be improved in various ways:

1) Rather than establishing separate and possinbly overlapping databases, the European legislator should consider the use of national databases to make actors more aware of European and foreign decisions.

The development of overlapping databases – as well as networks – alongside one another may give rise to confusion. Similar to networks, it may be therefore worthwhile to take existing, well-established networks – insofar as they exist throughout the Union – and databases as starting points in the collection of information.
Moreover, European actors may also make actors aware of well-established databases in various legal orders.

2) More use could be made of national databases in the development of transnational private law

Databases on national case law or national laws could underpin the development of model rules found in the different sets of soft law as well as debate on the question whether and how a model rule (detailed or otherwise) could be distilled from these cases.[1078]

3) Foreign databases should be made more accessible.

Particularly, the availability of the database in multiple languages may further its successful use. Doralt[1079] points out that not all lawyers have a good command of more than one foreign language and that translations of national case law, or summaries, could for that reason be valuable.

Weatherill[1080] finds that merely making mention of foreign decisions may not be as interesting as also providing information of the contents of a decision, previous decisions, and its relevance for legal practice. Furthermore, when using databases, users should be able to overview the information offered in those databases, in order to avoid an overload of information.

8.2.4.4. Conclusion on the use of databases

The current use of databases does not support interaction between actors in a manner similar in nation states. However, the use of databases can be improved. Rather than establishing new, overlapping databases, European actors should be encouraged to make more use of well-established databases in Member States, and the accessibility of these databases to foreign actors should be improved. In turn, wider accessibility may make actors more aware of relevant initiatives of other actors.

[1077] L.A.J. Senden, 'General Report, The quality of European legislation and its implementation and application in the national legal order', in: E.M.H. Hirsch Ballin, L.A.J. Senden (eds.), *Co-actorship in the development of European law-making*, TMC Asser Press: The Hague 2005, p. 128-129.
[1078] J.M. Smits, 'A European law on unjustified enrichment? A critical view on the law of restitution in the Draft Common Frame of Reference', in: A. Vaquer (ed.), *European private law beyond the Common Frame of Reference*, ELP: Groningen 2008, p. 7, W. Doralt, 'Strukturelle Schwächen in der Europäisierung des Privatrechts', *RabelsZ* 2011, p. 268-269.
[1079] W. Doralt, 'The Optional European Contract Law and why success or failure may depend on scope rather than substance', *Max Planck Research Paper* 2011, p. 6.
[1080] S. Weatherill, 'Can there be common interpretation of European private law?', *Georgia Journal of International and Comparative Law* 2002, p. 164.

8.2.5. Conclusion on the use techniques to strengthen the legislative process

This paragraph has asked what additional techniques could support the legislative process in the multilevel legal order.

Typically, the legislative process, and the techniques that support this process, show shortcomings and are not designed to facilitate interaction in the multilevel legal order. These shortcomings may already undermine the legislative process in nation states, but more problems may arise in the multilevel legal order. The criticism of the private law *acquis* and problems arising from the use of blanket clauses by the European legislator could also be seen in this light.

In particular the use of consultations and impact assessments could be improved. Notably, because the use of consultations and impact assessments is closely interrelated, especially at the European level, the shortcomings visible in the use of both these techniques may reinforce one another.

Because the use of consultations and impact assessments often overlap, problems in the use of one of these techniques may undermine the quality of legislation in the area of private law.

1) This has already become clear from the incomplete assessments based on the options presented in preceding consultations.
2) In addition, shortcomings in the use of consultations and impact assessments may facilitate *ad hoc* legislation, which may undermine the stable development as well as the quality of European private law.[1081]

For example, the reform of insolvency law was defended as a necessary modernisation that would ensure that insolvency law was in accordance with legal practice, and further accessibility, and could even prevent the bankruptcy of businesses that had less chance under the 'old' insolvency law.[1082] Instead, the government eventually found that a far-reaching reform of insolvency law was undesirable in times of recession, and existing insolvency law was maintained to improve predictability.[1083] That does not mean that insolvency law is not amended; instead, a legislative programme targeting specific aspects of insolvency law has been announced.[1084] If impact assessments underpin legislative proposals, would this ensure that either reforming or postponing reforming laws is based on more than assertions?

Failed suggestions for reform suggest that impact assessments or other empirical support for legislation do not stand in the way of ad hoc legislation or the delay or cancellation of well-established projects. For example, the proposal to allow for the compensation of emotional harm from the death or injury of a loved one in Dutch law[1085] was rejected[1086] despite empirical support for the legislative proposal.[1087]

[1081] Comp. W. van Gerven, S. Lierman, *Algemeen Deel. Veertig jaar later*, Kluwer: Deventer 2010, p. 184, on Belgian legislative practices.

[1082] Comp. the interview with Prof. B. Kortmann, presiding over the expert committee drafting the legislative proposal: L. Cornelisse, 'Nieuwe insolventiewet kan bedrijven redden', Interview 11 November 2010, available at http://www.sconline.nl/artikelen/details/2010/11-november/11/Nieuwe-insolventiewet-kan-bedrijven-redden.html.

[1083] *Kamerstukken II*, 2010-2011, 1014, Aanhangsel.

[1084] *Kamerstukken II*, 2012-2013, 29911, nr. 74.

[1085] *Kamerstukken II*, 2002-2003, 28 781, nr. 3, p. 4, referring to HR 8 September 2000, *NJ* 2001, 734, and HR 22 Febraury 2002, *NJ* 2002, 240.

[1086] *Handelingen I*, 2009-2010, 28781, nr. 23.

[1087] The rejection refers to A.J. Akkermans et al, *Slachtoffers en aansprakelijkheid: Een onderzoek naar behoeften, verwachtingen en ervaringen van slachtoffers en hun naasten met betrekking tot het civiele aansprakelijheidsrecht, Deel II*, WODC: Amsterdam 2008, available at http://wodc.nl/onderzoeksdatabase/affectieschade.aspx.

3) Defects in the use of consultations make it less likely that the law is developed in a responsive manner, which can be aggravated by shortcomings in the use of impact assessments, which decrease the chance that the development of private law is based on a demonstrable need for the development of private law in a specific way in legal practice.

A defective use of both consultations and impact assessment will not serve to further debate, and makes it more likely that legal reform is not based on views from legal practice, experts, and stakeholders. Ignoring expert advice may undermine the quality of private law, especially if it leads to inconsistencies between national private laws and private law at the European level. In turn, national private law that is, for example, inconsistent, easily outdated, largely circumvented in practice, or unpredictable, may affect the interpretation of Directives.

Interestingly, there are indications that Dutch private law judges in courts of first instance and appeal courts only rarely apply European law in private law cases, also due to a lack of familiarity with European law.[1088] Accordingly, Niglia[1089] traces the lack of enforcement to the limited involvement of national scholars and judges in the drafting of the private law *acquis*.

The use of networks and databases does not show similarly serious shortcomings, but neither do they compensate for these shortcomings.

The suggestions for improvement for the additional techniques make apparent that improvements depend on the participation of both national and European actors, as well as non-state actors. Interdependence also becomes visible when shortcomings are visible in the legislative process at one level.

1) Delay in the legislative process at the European or national level may in turn affect the legislative process at the national or the European level.

Lengthy legislative procedures at the European level may inhibit the reform of national private law as harmonisation on this issue is forthcoming. Alternatively, national legislators may speed up reform, in order for reformed law to act as a model for European measures, or the national legislature may choose to anticipate harmonisation or quickly implement harmonised law, trying to compensate for a lengthy legislative procedure at the European level. If this is not the case, the delay in legislative procedures may also 'add up', leading to both a lengthy legislative procedure at the European level, as well as a lengthy (and probably late) implementation into national law.

2) Shortcomings in the European legislative process frequently entail ignoring insights from legal practice, which decreases the chance that private law will be responsive. Importantly, this lack of responsiveness may subsequently 'spread' to national law if legislative competences have been reallocated to the European level, which will be the case if European measures pursue maximum harmonisation.

Do the suggestions for improvement lead to a legislative process that closely resembles the legislative process in nation states? The argument for deliberation may give this impression. Notably, the use of consultations, networks and databases may contribute to debate in the legislative process that more closely resembles the debate in the legislative process in nation states. However, this is not the case:

[1088] Hague Institute for the Internaitonalisaiton of Law, *Research project: National judges as European Union judges, results and recommendations*, summary available at http://www.hiil.org/research/main-themes/highest-courts/research-project-national-judges-as-european-union-judges/results-and-recommendations/.
[1089] L. Niglia, 'The non-Europeanisation of private law', *ERPL* 2001, p. 595.

- Debate should not merely resemble the debate in nation states; there should be more and better interaction than is the case in nation states, between more actors.

In particular, interaction between actors from different level should be encouraged. National legal practitioners and academics should be involved more in the debate at a European level. Also, national Parliaments should already be involved in the drafting of the private law *acquis* in an early stage.[1090] Accordingly, national Parliaments may initiate debate on the reform of the *acquis*.[1091] Additionally, national state actors as well as European institutions should more closely interact with European actors, for example with regard to the question what role soft laws should play in the reform of the private law *acquis*. European actors should also be more involved in the developments at the national and the international level.

The debate could ibe strengthened if advisory organs to legislators also pay attention to comparative law and developments by other states or developments at a European and the international level.[1092] National advisory organs may also seek to participate in the drafting of European law.[1093] At the European level, Sandström[1094] has pointed to the possible role of the Council Legal Service in this respect, and suggested a European Council on legislation.

- The use of consultations, networks and databases does not necessarily mean that actors will change the way they interact with one another. In particular, these techniques do not encourage actors to pay more attention to the use of techniques. However, a better use of impact assessments may change debate in this respect.

These improvements may be a step towards deliberation, but deliberation, which aims at achieving consensus, may well turn out to be cumbersome and lengthy.[1095] The length of this process is not only affected by the number of participants, but also by the number of points that parties have to agree upon. Thus, the wider the scope of harmonisation initiatives, the more difficult it will be to achieve consensus and the lengthier the process. However, the current shortcomings in the legislative process have also led to problems that include slow, cumbersome and inefficient proceses.

[1090] In this sense L.A.J. Senden, 'De lidstaten en de kwaliteit van Europese wetgeving: geen consumenten, maar co-actoren', *SEW* 2006, p. 56.
[1091] See for example the select European Union committee that collected evidence on the *Green Paper on the Review of the consumer acquis* COM (2006) 744 final and the response of the UK government to the Green Paper. See for a summary of responses from stakeholders http://www.parliament.the-stationery-office.co.uk/pa/ld200910/ldselect/ldeucom/29/29250.htm#note133.
[1092] M. Scheltema, *Het recht van de toekomst* (inaugural address Utrecht), Kluwer: Deventer 2005, p. 8.
Possibly, the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union could provide a forum for such exchanges – see further http://www.juradmin.eu/en/home_en.html.
[1093] Comp. L.A.J. Senden, 'General Report, The quality of European legislation and its implementation and application in the national legal order', in: E.M.H. Hirsch Ballin, L.A.J. Senden (eds.), *Co-actorship in the development of European law-making'*, TMC Asser Press: The Hague 2005, p. 124.
[1094] G. Sandström, 'Knocking EU law into shape', *CMLRev* 2003, p. 1311-1312.
[1095] F.W. Scharpf, 'European governance: Common concerns vs the challenge of diversity', *Jean Monnet Working Paper* 6/01, p. 6.

8.3. Additional techniques beyond the legislative process: blanket clauses

This paragraph asks which techniques used in addition to currently used techniques could contribute to a the predictability and consistency of private law developed through blanket clauses. The use of blanket clauses may give rise to unpredictability, and suggestions for the use of additional techniques to compenstae for these problems can be found both at the European and the national level. At both levels, the importance of coordination between different actors has been emphasised.

Paragraph 8.3.1. will discuss the suggestions for guidance on the interpretation of blanket clauses and paragraph 8.3.2. will consider the development of comitology procedures and reminiscent national procedures. Paragraph 8.3.3 will address the use of alternative regulation and paragrah 8.3.4. will end with a conclusion.

8.3.1. Guidance on the interpretation of blanket clauses

The development of guidelines has been suggested for both the European and the national level. For the European level, Pavillon[1096] finds that there should be more information on the interpretation of harmonised law throughout the Union, in order for judges to be able to refer to it. To this end, she suggests the use of Guidances by the European Commission, which should be available in the different languages spoken in the EU, as well as easily accessible, and based on a database collecting decisions on the interpretation of blanket clauses.[1097] Accordingly, guidance on the interpretation of Directive 2005/29 on unfair commercial practices has been developed. [1098]

Similar suggestions for additional techniques can be found especially in the Dutch legal order. Asser, Groen, Vranken and Tzankova,[1099] in their 2006 report on the reform of Dutch civil procedure law, state that alongside a new codification, guidance on the interpretation of the new codification should be developed, in addition to case law and literature that will develop on a new codification. In their opinion, such guidance will considerably accelerate the understanding and application of reformed law in legal practice, which may otherwise be a lengthy process in which lack of clarity exists on the meaning of reformed law. The additional ways in which guidance is offered should be seen in combination with one another, and include setting up a helpdesk dealing with questions on the new law, the answers to which should be made available to legal practice. Guidance has also been developed at a national level.[1100]

8.3.2. Suggestions for comitology procdures

Pavillon[1101] points to article 40 proposal for a Directive on consumer rights, which initially suggested establishing a comitology committee for further developing black and grey lists. Yet it was insufficiently clear what sort of comitology comittee would be established, and

[1096] C.M.D.S. Pavillon, *Open normen in het Europees consumentenrecht*, Kluwer: Deventer 2011, p. 521-523.
[1097] Available at https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.home.show.
[1098] See for example he Guidance on the interpretation of Directive 2005/25 on unfair commercial practices.
[1099] W.D.H. Asser, H.A. Groen, J.B.M. Vranken, I.N. Tzankova, *Uitgebalanceerd. Eindrapport fundamentele herbezinning Nederlands burgerlijk procesrecht*, BJU: The Hague 2006, p. 253-261.
[1100] The European Parliament in its resolution of 13 January 2009, on the transposition, implementation and enforcement of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and Directive 2006/114/EC concerning misleading and comparative advertising (2008/2114(INI)), par. 23 refers to the UK Guidance "Consumer Protection from Unfair Trading Regulations: a basic guide for business", available at http://www.oft.gov.uk/shared_oft/business_leaflets/cpregs/oft979.pdf, as an example of 'best practice'.
[1101] C.M.D.S. Pavillon, *Open normen in het Europees consumentenrecht*, Kluwer: Deventer 2011, p. 524-525.

whether the suggestion that the black and grey lists are a merely technical issue that can be dealt with through comitology is convincing.

The suggestion for comitology committees is in line with other suggestions to accelerating procedures to amend European law rather than using blanket clauses, to enhance the flexibility of European law.[1102] Arguably, minimum harmonisation should leave national state actors with sufficient competence to respond to developing practices, and society's legal views on justice. Thus, minimum harmonisation takes the coexistence of actors as a starting point and allows for legal experimentation by Member States, which in turn may provide a source of inspiration for other Member States as well as European actors.[1103]

At a national level, proposals for procedures reminiscent of comitology have also been made. The 2006 Dutch report has suggested establishing a committee with limited competences to provide rules on the interpretation of blanket clauses, as well as benchmark figures and other ambiguous provisions in codifications. Such a committee should ideally consist of legal practitioners as well as scholars.[1104] Thus, differently than the European proposal, the Dutch suggestion did not concern the amendment of the Dutch black and grey lists, but it did aim to provide clarity on the interpretation of blanket clauses. The European suggestion, however, was also aimed at promoting flexibility. At the national level, there was less need for flexibility, and more need to guarantee the predictable and consistent development of the law int he event of recodification.

8.3.3. The use of alternative regulation in the interpretation of blanket clauses

Arguments to make use of alternative regulation in the interpretation of both harmonised and "traditional" blanket clauses have been made. Taking into account national alternative regulation would also allow for the differentiation in the interpretation of blanket clauses.[1105] In some successful Dutch instances, alternative regulation already provides more predictability and consistency.[1106]

Possibly, consistently looking to both surrounding private law and well-established self-regulation and co-regulation may increase responsiveness and make clearer to foreign private parties what standards of behaviour are expected from businesses, *if* those standards are freely and fully available to those foreign private parties. However, if self- and co-regulation bind third parties, it is essential that foreign parties that are affected by those rules are aware of these rules; this means not only publicly providing these rules, but also making them available in multiple languages. Subsequently, the more sharply delineated rules could be evaluated by the judiciary.

Perhaps, comparing self-regulation in different Member States, and collecting information on codes of conduct in different Member States would make self-regulation more accessible to foreign contract parties. Additionally, actors may be made more aware of relevant self-regulation through databases and through network organisations that promote self-regulation, while the members of these organisations also widely develop self-regulation, such as the European Advertising Standards Alliance.

[1102] E. Terryn, 'The Green Paper on the review of the consumer *acquis*', *TvC* 2007, p. 108.
[1103] E. Terryn, 'The Green Paper on the review of the consumer *acquis*', *TvC* 2007, p. 108.
[1104] For other legal orders, different composition of committees may be suggested; see further chapter …
[1105] V. Mak, 'Scharnierpunt tussen Europees en nationaal consumentenrecht', *MvV* 2011, p. 185.
[1106] W.D.H. Asser, H.A. Groen, J.B.M. Vranken, I.N. Tzankova, *Uitgebalanceerd. Eindrapport fundamentele herbezinning Nederlands burgerlijk procesrecht*, BJU: The Hague 2006 refer to, for example, the '*Kantonrechtersformule*', see further http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-kantonrecht/Aanbevelingen-van-de-kring-van-kantonrechters/Pages/Kantonrechtersformule.aspx.

However, this presupposes that such codes of conduct exist, and that they are also generally acceptable in other Member States. Difficulties may also arise if self-regulation is interpreted differently in different Member States, or if relevant national mandatory private laws diverge.

Pavillon[1107] argues against the use of national default law or alternative regulation as a decisive means to clarify or differentiate in the interpretation of European concepts. She points out that putting too much weight on national viewpoints may undermine harmonisation. Yet if measures pursue minimum harmonisation, this arguably leaves room for courts to take national viewpoints into account, provided that the level of consumer protection does not go below the standard set by the Directives or violates the fundamental freedoms set out in the TFEU. In contrast, if measures pursue full or 'targeted' full harmonisation, it is less likely that judges can take national points of view into account. In those cases, however, perhaps cross-border self-regulation – such as the EMOTA Convention – may be used to interpret blanket clauses.

However, the argument that alternative regulation may undermine harmonisation becomes less convincing when considering Dutch case law. Giesen[1108] has pointed out that Dutch courts occasionally refer to alternative regulation without adopting a consistent approach to the use of alternative regulation, and the use of alternative regulation does not lead to a specific outcome. Vranken,[1109] on the other hand, holds that the *Hoge Raad* does take alternative regulation into account, but often does not do so explicitly, and this is the reason for criticism of unpredictability in the interpretation of ambiguous concepts. Therefore, Vranken suggests that the *Hoge Raad* should explicitly leave room for filling in blanket clauses.

8.3.4. The introduction of the prejudicial procedure in Dutch law

The introduction of the prejudicial procedure is based on a 2007 report on the task of the Hoge Raad and also inspired by the European prejudicial procedure as well as French procedures. The drafting of the law was preceded by a public consultation and advice from practitioners and the judiciary.[1110]

The introduction of the prejudicial procedure in collective procedures in Dutch law could, in combination with the cassation in the public interest ('*cassatie in het belang der wet*') stimulate the development of case law by the highest courts on issues that do not frequently come before higher courts.[1111] Thus, more decisions, will contribute to the consistent and predictable development of the law. Generally, this procedure should enable the courts to refer questions at the request of parties or *ex officio*[1112] on questions of law arising from cases where mass damages may arise, thus contributing to the responsiveness of private law to legal practice. Article 392 par. 1 sub b Rv also enables courts to refer questions for

[1107] C.M.D.S. Pavillon, *Open normen in het Europees consumentenrecht* (PhD thesis Groningen), Kluwer: Deventer 2011, p. 520.
[1108] I. Giesen, De omgang met en handhaving van "meervoudigheid van maatschappelijke normstelsels"', *WPNR* 6772 (2008).
[1109] J.B.M. Vranken, 'Taken van de Hoge Raad en zijn parket in 2025', in: I. Giesen, A.M. Hol (eds.), *De Hoge Raad in 2025: Contouren van de toekomstige cassatierechtspraak*, BJU: The Hague 2011, par. 2.2.
[1110] *Kamerstukken II*, 2010-2011, 32612, nr 3, p. 1.
[1111] See further M.M. Stolp, J.F. de Groot, 'Een nieuwe procesvorm: Het stellen van prejudiciële vragen aan de Hoge Raad (art. 392-394 nieuw Rv)', *MvV* 2012, p. 165.
[1112] The legislator has argued that this is not conrary to party autonomy as it concerns claims that they have brought before the courts, against which there is no appeal (article 392 par. 3 Rv). Similarly, the rejection of referring questions t the Hoge Raad is also not open to appeal. However, interested parties (including parties in the case) may have the opportunity to express their views under articles 392 par 2 and 393 par. 2 and 4 Rv. Notably, parties – and third parties – have to bear the costs of the prejudicial procedure. It is not clear whether the judge should also refer questions to the Hoge Raad if both parties express that they are not interested in doing so; comp. *Kamerstukken II*, 2010-2011, 32612, nr 3, p. 14.

cases where the answer to the question is of direct interest for the adjudication of multiple similar cases where a similar question arises. In other words, questions should reflect a more general public interest. The standard established in article 392 Rv indicates that referral should not be done lightly, and the legislator did not expect that this new procedure will give rise to a considerable additional number of cases before the Hoge Raad; the legislator estimated that ten prejudicial questions per year would be decided.[1113]

The extent to which prejudicial questions will contribute to the relatively quick adjudication of cases will also depend on the stage of proceedings in which a question is referred.[1114] Initially, courts with a single member could not refer prejudicial questions to the Hoge Raad, which also includes cantonial courts. This would have considerably limited the extent to which the introduction of the prejudicial procedure could have contributed to predictable and consistent decisions in consumer law, as article 93 sub d Rv provides that consumer cases[1115] are decided by cantonial courts which are typically composed of one judge. It concerns an experiment, partially based on comparative law insights, which in accordance with article IV Act on prejudicial questions will be evaluated in five years.

Arguably, the successful introduction of a national prejudicial procedure in the Dutch legal order may encourage the Hoge Raad to submit more questions to the CJEU, especially if it concerns cases that would otherwise not have reached the Hoge Raad.

8.3.5. Conclusion on the use of techniques in addition to blanket clauses

The use of guidelines, comitology committees, and ex ante control may contribute to the predictability and consistency of private law developed through blanket clauses. The similarity between these suggestions indicate that current suggestions for additional techniques may be based on national ideas on the interpretation of blanket clauses in the private law *acquis*. Both the suggestions of Asser, Groen, Vranken and Tzankova[1116] as well as Pavillon[1117] indicate that ideally, guidance and practice directions should be based on debate between all relevant actors, and they set out various techniques to be used alongside one another. The suggestions of Pavillon make clear that the clarification of blanket clauses in the private law *acquis* could be achieved by using additional techniques that contribute the harmonised interpretation of those provisions throughout the Union.

Yet it can be doubted whether a more harmonised interpretation and application of blanket clauses would leave sufficient room for responsiveness. If blanket clauses in the private law *acquis* may not be interpreted in accordance with national alternative regulation, this increases the chance that blanket clauses will not be interpreted responsively.

The suggestions to increase the predictability and consistency of private law have not been made in all legal orders. Particularly, similar suggestions have not been made in the German legal order, although blanket clauses have been subject to criticism in the past.[1118] However, the additional techniques may lead to *Fremdbestimmung*. However, the amount of

[1113] *Kamerstukken II*, 2010-2011, 32612, nr 3, p. 4.
[1114] R.P.J.L. Tjittes, R. Meijer, 'Franse en Europese lessen voor een prejudiciële procedure bij de Hoge Raad', *RM Themis* 2009, p. 165 point out that if prejudicial questions are brought and answered in an early stage of proceedings where all facts have not yet been established, it may also be important that judges bringing the question can later deviate from the *Hoge Raad*'s judgment, especially if facts turn out to lie differently than the judge in first or second instance realised. According to N. Frenk, A.M. Wolffram-van Doorn, 'Het voorontwerp prejudiciële vragen aan de Hoge Raad', *RM Themis* 2009, 162-163, judges may in those cases deviate from the answer of the *Hoge Raad*.
[1115] Cases on employment contracts and contracts for accommodation are also decided by cantonial courts.
[1116] W.D.H. Asser, H.A. Groen, J.B.M. Vranken, I.N. Tzankova, *Uitgebalanceerd. Eindrapport fundamentele herbezinning Nederlands burgerlijk procesrecht*, BJU: The Hague 2006, p. 259.
[1117] C.M.D.S. Pavillon, *Open normen in het Europees consumentenrecht* (PhD thesis Groningen), Kluwer: Deventer 2011, p. 529.
[1118] Especially J.W. Hedemann, *Die Flucht in Generalklauseln*, Mohr: Tübingen 1933.

Fremdbestimmung also depends on the question how committees are composed – if committees consist of academics and members of the judiciary, this is likely less problematic, if stakeholder groups would play a role, even if legal practitioners were to play a role, this may be more problematic. Moreover, the transparency of the drafting processes, and opportunity for debate, would also be relevant, as it may provide actors affected by these rules a chance to influence these rules. Yet even if such committees were accepted, their role in developing, for example, black and grey lists would be limited, as these lists are considered as clearly political, and development of these lists should therefore be subject to democratic scrutiny. Consequently, guidelines developed by committees would still be subject to democratic debate, depending on the political content of these rules.

Instead, a more traditional approach becomes apparent: by establishing a general part, and a coherent system, the legislator has provided "guidelines" to the interpretation of blanket clauses.[1119] The amount of case law subsequently contributes to the predictability and consistency of newly drafted blanket clauses.

[1119] HKK/Schmoeckel, Allgemeiner Teil des BGB, introduction, nrs 35, 41. It is unclear, however, how general provisions may provide *specific* guidance on the interpretation of blanket clauses in individual cases.

8.4. Additional techniques beyond the legislative process: Standard Terms and Conditions (STC's)

This paragraph will ask will ask how STC's could be used as an additional technique, and how that could improve European private law.

Paragraph 8.4.1. will consider the use of STC's and paragraph 8.4.2. will consider how STC's may contribute to the predictable and responsive development of the private law *acquis*. Paragraph 8.4.3. will end with a conclusion.

8.4.1. The current use of STC's

STC's have frequently been recognised as an important element in trade.[1120] A number of often used clauses identified by McKendrick[1121] include: clauses to ensure that the standard terms are applicable to contracts, retention of title clauses – also recognised by the Commission[1122] – hardship clauses, clauses limiting or excluding liability, price escalation clauses, clauses on the payment of interest, clauses on arbitration and choice of law and clauses with regard to assignment. In addition, the International Contracts Working Group has published analysed the use of a number of often used clauses in international commercial practice, also discussing the use of confidentiality clauses, penalty clauses and termination clauses.[1123]

8.4.2. Improving the predictability and responsiveness of private law

STC's can contribute to a more predictable development of the *acquis* in the following ways:

1) STC's could be used as a starting point to identify which divergences of private laws may pose an obstacle to cross-border trade.

Especially mandatory private law may block the application of 'foreign' STC's. In addition, the private law *acquis*, especially Directive 86/653 on self-employed commercial agents and Regulations in the field of international private law may affect the validity of standard contract terms.[1124] Also, the use of cross-border STC may be affected by 'surrounding' national default contract law. If these default rules are identified, the question arises whether these divergences should subsequently be harmonised. Notably, private parties, if made aware of these divergences, could subsequently seek to provide for specific rules in their contracts that diverge from these default rules. Notwithstanding these possibilities, harmonisation in this area has already been proposed.

2) The development of STC that could be used throughout the Union could contribute to predictability.

In its 2003 Action Plan, the Commission, suggested promoting the use of standard contract terms and conditions throughout the Union.[1125] Subsequently, the 2004 Communication[1126] on the revision of the

[1120] R.P.J.L. Tjittes, 'Uitleg van schriftelijke contracten', *RM Themis* 2005, p. 2 even states that these clauses can be considered as more adequately reflecting "principles" of contract law in the European Union than soft law rules such as the DCFR, PECL and the UNIDROIT Principles.
[1121] E. McKendrick, *The creation of a European law of contracts – The role of standard form contracts and principles of interpretation*, Kluwer: Deventer 2004, p. 5.
[1122] See for example European Commission, *Proposal for a European parliament and Council Directive combating late payment in commercial transactions*, COM (1998) 126 final, p. 8.
[1123] M. Fontaine, F. de Ly, *Drafting international contracts: An analysis of contracts clauses*, Nijhoff: Leiden/Boston 2009.
[1124] U. Bernitz, 'The Commission's Communications and standard contract terms', in: S. Vogenauer, S. Weatherill (eds.), *The harmonisation of European contract law*, Hart: Oxford 2006, p. 186.
[1125] Communication from the Commission to the European Parliament and the Council*, A more coherent European contract law: An action plan*, COM (2003) 68 final, p. 21 et seq.

acquis suggested that private parties develop standard terms and conditions that could subsequently be used throughout the Union, claiming that 'there are a number of examples of EU-wide STC being used successfully', unfortunately without elaborating which standard terms are defended as such.[1127] The Commission emphasised the role of private parties and the use of a website by way of a 'platform' to promote the exchange of information and considering the possibility that mandatory law could be an obstacle.

However, in later policy papers, this idea has disappeared. In its first annual report on European contract law and the *acquis* review,[1128] the Commission states that providing a website to promote the exchange of information is problematic for a number of reasons:

i) European-wide contract terms would have to meet the requirements of the national private law extending the most extensive control over standard contract terms, which would may make them less attractive for actors involved in cross-border trade in states with less extensive constraints.

ii) EU wide standard contract terms would only be used in specific sector instead of several sectors. The complexity of this initiative should not be underestimated. If the development of these sets is not coordinated, fragmentation and inconsistencies may arise.

iii) The necessity to keep standard contract terms up to date with changing legislation and case law may be problematic, and require considerable time and money. Parties that have invested in up-to-date standard contract terms may not be inclined to make the results of their investment freely available.

iv) Providing a platform for standard contract terms while not checking the compatibility of these terms with contract law and competition law constraints undermines the value of that exchange.

v) Whittaker[1129] points out that problems might arise with regard to the question in what languages European STC's should be provided, and the lack of 'autonomous' interpretation of these terms throughout the Union, as the CJEU would not have competence to interpret these terms.

vi) Both McKendrick[1130] and Whittaker[1131] point out that European STC's would still be interpreted differently throughout the Union, even in the absence of mandatory law restrictions, as judges adopt a different approach to the interpretation of contracts, and make use of different sources for the interpretation of contracts.

However, this option may not be feasible politically. An important added value of a European set of STC's would be the possibility that European STC's would be applicable throughout the Union regardless of diverging mandatory law. However, this possibility would entail radical changes of national mandatory laws, and quite probably it is much less feasible than 'traditional' harmonisation.

3) Non-state actors may also collect and provide information of often-used clauses and thereby improve parties' ability to adequately assess their legal position in cross-border contracts. Increasing parties' awareness of the risks in the use of STC's may

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[1126] Communication from the Commission to the European Parliament and the Council, *European contract law and the revision of the acquis: the way forward*, COM (2004) 651 final, par. 2.2.1, 2.2.2.
[1127] These might include the standard terms and conditions developed by Orgalime and the terms and conditions developed by the Chartered Institute of Purchasing and Supply. See further http://ec.europa.eu/internal_market/contractlaw/2004workshop_summary_en.htm.
[1128] European Commission, *First annual report on European contract law and the acquis review*, COM (2005) 456, par. 41.
[1129] S. Whittaker, 'On the development of European standard contract terms', *ERCL* 2006, p. 60-61.
[1130] E. McKendrick, *The creation of a European law of contracts – The role of standard form contracts and principles of interpretation*, Kluwer: Deventer 2004, p. 27-43.
[1131] S. Whittaker, 'On the development of European standard contract terms', *ERCL* 2006, p.66-67.

enable them to cope with these difficulties more easily, especially if STCs are interpreted in accordance with national default law.

Of course, gathering information on STC's in itself does little to overcome divergences in national private laws, and this might lessen the attractiveness of this course of action by the European legislator.[1132] For example, alerting parties to different approaches towards the interpretation of contracts may prove worthwhile.

Collecting information, and making it available to private parties, if possible in multiple languages, may take place through various ways that may also be pursued in combination with one another – through establishing databases on boilerplate clauses, case law and legislation, and academic research and publications on often used clauses may well provide a suitable starting point. However, the success of such an enterprise possible also depends on the use that private parties make of this information, and the awareness with private parties that such information *is* provided.

4) Studying STC's may also contribute to the responsiveness of the law

According to Montaine and De Ly,[1133] the study of international legal practice may add insight on practices, such as the use of letters of intent that are currently ignored in traditional debate on private law. Montaine and De Ly[1134] also point out that studying international legal practice may provide more insight in creative drafting processes and enable rules to adequately cope with these practices, thus contributing to the responsiveness of private law to legal practice. For example, instead of concentrating upon the question whether offer and acceptance lead to a contract, it is also possible to look at the international practice of 'letters of intent', 'heads of agreement' and 'memorandum of understanding' and question what legal consequences these different kinds letters have for private parties, or give guidelines whether and which parts of such letters or agreements could be binding.[1135]

8.4.3. Conclusion on the use of STC's

STC's can contribute to especially the predictable and responsive development of the private law *acquis*. Studying STC's to identify divergences that hinder cross-border trade may benefit predictability, while it also enhances insight in cross-border businesses. Moreover, sharing information on STC's may increase predictability for parties involved in cross-border trade.

However, the development of European STC's may entail fragmentation as the development of European STC's would necessitate changes in various areas of private laws. For example, divergences in property law may be found to pose a barrier to the cross-border use of title of retention clauses,[1136] but the effectiveness of retention of title clauses may also depend on insolvency law and procedural law. Other initiatives may however similarly lead to fragmentation – for example, establishing STC's that could be used throughout the Union would necessarily have to be formed per sector, rather than generally, for 'all' contract parties. *If* harmonisation in these different areas is considered desirable, as well as feasible, impact assessments and consultations could contribute to finding techniques to deal with fragmentation and inconsistencies in the *acquis* and national private laws that may arise after harmonisation – or other actions.

[1132] Comp. also S. Whittaker, 'On the development of European standard contract terms', *ERCL* 2006, p. 54, who points out that contracts generally seek to provide contract parties with predictability with regard to their legal position and its rights and duties towards other contract parties, and asserts that this primary aim of contracts should not be distracted by an implicit aim to further convergence of private laws throughout the Union.

[1133] M. Fontaine, F. de Ly, *Drafting international contracts: An analysis of contracts clauses*, Nijhoff: Leiden/Boston 2009, p. 621.

[1134] M. Fontaine, F. de Ly, *Drafting international contracts: An analysis of contracts clauses*, Nijhoff: Leiden/Boston 2009, p. 634-635.

[1135] See on this question G. Cordero Moss, 'The function of letters of intent and their recognition in modern legal systems', in: R. Schulze (ed.), *New features in European contract law*, Sellier: Munich 2007, p. 139.

[1136] Despite article 9 Directive 2011/7 on combating late payment, which merely establishes that these clauses should be recognised.

STC's can be used in combination with various other techniques. Thus, European-wide STC's could be developed more easily under an optional instrument that provides a framework for drafting and interpreting STC's. Also, soft laws could be used to clarify the meaning of often used terms in so-called boilerplate clauses.[1137]

[1137] E. McKendrick, *The creation of a European law of contracts – The role of standard form contracts and principles of interpretation*, Kluwer: Deventer 2004, p. 43-44 suggests that predictability in cross-border trade could be enhanced if there is agreement on a common meaning of often-used terms, in the DCFR. The DCFR has also been considered in this regard by the European Parliament that suggested, in the 2004 Communication of the Commission Communication from the Commission to the European Parliament and the Council, *European contract law and the revision of the acquis: the way forward*, COM (2004) 651 final, par. 2.1.2 that states that a CFR could be used as 'a body of standard contract terms to be made available to legal practitioners'. S. Whittaker, 'On the development of European standard contract terms', *ERCL* 2006, p. 57 however rightly notes that the idea of developing STC, which necessarily would be sector-specific, does not agree with the idea of developing the idea of the DCFR as a non-sector specific instrument, and accordingly, the idea of the DCFR containing standard terms and conditions seems to have been abandoned. Additionally, as the DCFR may at points diverge from the private law *acquis*, the question arises to what extent the DCFR is suitable to be used as such a 'dictionary' in transnational commercial contracts.

8.5. Additional techniques beyond the legislative process: The Open Method of Coordination ('OMC')

This paragraph will ask whether the use of OMC may contribute to the development of European private law that is more predictable, consistent, accessible or responsive.

Paragraph 8.5.1. will descibe the OMC and paragraph 8.5.2. will ask in what ways the use of OMC can contribute to a more comprehensible European private law. Paragraph 8.5.3. will address the drawbacks of OMC and paragraph 8.5.4. will end with a conclusion.

8.5.1. A closer look at the OMC

Typically, OMC has primarily been used in social policy areas where the Union has little or no legislative competences.[1138] Accordingly, article 5 par. 3 TFEU recognises that coordination may take place with regard to Member States' social policies.[1139] Rather than emphasising harmonisation, the OMC would focus on the development of policies, and the focus could also shift from legislation towards other 'softer' methods, such as the use of databases, networks, or model laws.[1140]

The OMC emphasises co-operation between actors, to establish common goals, and exchange best practices.[1141] Four stages can be distinguished in OMC: firstly, common aims are established, as well as schedules to achieve these aims. Subsequently, benchmarks and indications to identify and compare best practices are developed, and actors establish policies to achieve the common aims. Finally, periodical review and evaluation are established.[1142]

The Commission plays 'an active co-ordinating role', which implies a top-down approach towards OMC. In addition, De la Rosa[1143] also signals the prominent role of both the Commission and the Council in the OMC. According to the European Council, the OMC does not only involve state actors. Instead, it includes the Union, Member States, sub-national actors, the social partners and civil society.[1144] Possibly, if OMC is used in a way that includes relevant (affected) actors, this could stimulate debate between those actors on the basis of, for example, exchanged best practices or similar problems. Senden[1145] moreover notes that the OMC should not be considered as "one instrument" that necessarily embodies all the characteristics summed up above and is generally based upon "soft techniques" such as benchmarks and peer pressure.

For European private law, the use of OMC entails that the Union may encourage Member States to coordinate their policies, in the interest of the internal market or the

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[1138] E. Szyszczak, 'Experimental governance: the Open method of Coordination', *ELJ* 2006, p. 488.
[1139] Comp. also articles 23 TFEU (withr egard to diplomatic assistence to Union citizens in third countries), articles 67and 73 TFEU (with regard to a high level of security in the area of freedom, seurity, and justice), article 85 TFEU (on Eurojust), articles 119 TFEU (with regard to a economic policy),article 150 TFEU (withregard to an Employment Committee), article 156 TFEU (on social policies), article 171 TFEU (with regard to trans-Euroepan networks of energy, transport and energy infrastructures), 173 TFEU (industry), article 181 TFEU (research and technical development activities), artciles 210 and 214 TFEU (humanitarian aid).
[1140] See further on the use of model laws below par. 8.6.3.3.
[1141] Comp. the Presidency Conclusions of the Lisbon European Council, http://www.europarl.europa.eu/summits/lis1_en.htm, 23-24 March 2000, par. 37, European Commission, *White paper on European Governance*, COM (2001) 428 final, p. 21-22.
[1142] Presidency Conclusions of the Lisbon European Council, http://www.europarl.europa.eu/summits/lis1_en.htm, 23-24 March 2000, par. 37.
[1143] S. de la Rosa, 'The Open Method of Coordination in new Member States – the perspectives for its use as a tool of soft law', *ELJ* 2005, p. 627-628.
[1144] Presidency Conclusions of the Lisbon European Council, http://www.europarl.europa.eu/summits/lis1_en.htm, 23-24 March 2000, par. 38.
[1145] L.A.J. Senden, Reguleringsintensiteit en regelgevinsinstrumentarium in het Europees Gemeenschapsrecht. Over de relatie tussen wetgeving, soft law en de open methode van coördinatie', *SEW* 2008, p. 50.

freedoms established in the Treaties.[1146] As Borrás and Greve[1147] point out, the OMC generally emphasises a common aim, rather than the means to achieve that aim, which provides Member States with a considerable amount of leeway to take measures to achieve common aims, and takes away the need for detailed rules and mechanisms at a European level.

The OMC could be used in addition to existing harmonisation measures. If actors are not willing to participate in the OMC, this could prompt the use of less voluntary methods. OMC could also serve as a first step towards future harmonisation initiatives. Typically, the use of OMC does not confer competences from the national to the European level.[1148] Yet if the OMC can be used as a starting point for harmonisation, it may strengthen 'competence creep'.[1149]

8.5.2. Improving the responsiveness of European private law?

The OMC could contribute to the quality of European private law in various ways:

1) The OMC could stimulate regulatory competition.

The OMC has already been mentioned in the Lisbon conclusions with regard to the reform of company law.[1150] Similarly, in other areas, such as corporate governance or collective redress, regulatory competition and further convergence could be improved.

2) The OMC could improve interaction between actors.

Van Gerven[1151] has suggested the use of a 'Open Method of Convergence', rather than the Open Method of Coordination that focusses on the coordination of national policies. The Open Method of Convergence entails that converge would not only be the result of harmonisation efforts from the European Union, but also from comparative law research and databases, education throughout the EU on a firm comparative and European law basis and a better coordinated implementation of the *acquis*, based on voluntary participation by not only Member States but also non-state actors.

3) The OMC could improve participation in alternative regulation.

For example, the Commission has suggested that OMC could stimulate the involvement of relevant stakeholders to "social dialogue"- which could for example affect the participation of relevant stakeholders to consultations preceding framework agreements.[1152] Although increasing the amount of responses to consultations may be useful and provide more insights in the views and needs of stakeholders, this does not increase the influence of consulted parties.

Thus, the OMC can contribute to the responsiveness of private law as it emphasises interaction between actors, which increases the chance that state actors will become aware

[1146] L.A.J. Senden, Reguleringsintensiteit en regelgevinsinstrumentarium in het Europees Gemeenschapsrecht. Over de relatie tussen wetgeving, soft law en de open methode van coördinatie', *SEW* 2008, p.54. The European Commission, *European governance, A White Paper*, COM (2001) 428 final, p. 21-22 has clearly considered OMC as a 'complementary' technique, to support, not replace, the "traditional" method of harmonisation.
[1147] S. Borrás, B. Greve, 'Concluding remarks: New method or just cheap talk?', *JEPP* 2004, p. 332.
[1148] V. Hatzopoulos, 'Why the Open Method of Coordination is bad for you: A letter to the EU', *ELJ*, p. 318-319.
[1149] E. Szyszczak, 'Experimental governance: The Open Method of Coordination', *ELJ* 2006, p. 501. Comp. also J. Scott, D.M. Trubek, 'Mind the gap: law and new approaches to governance in the European Union', *ELJ* 2002, p. 7. Comp. Ph. Syrpis, 'Legitimising European governance: Taking subsidiairyt seriously within the Open Method of Coordination', *EUI Working Paper* 2002, p. 28, who is critical of the OMC insofar as actors increasingly set specific goals at the European level even if the benefit of those aims is not clear.
[1150] See European Council, Conclusions of the Presidency of the meeting of 23 and 24 March 2000, available at http://www.europarl.europa.eu/summits/lis1_en.htm#b, par. 14-15.
[1151] W. van Gerven, 'The Open Method of Convergence', *Juridica International* 2008, p. 40.
[1152] European Commission, *The European social dialogue, a force for innovation and change*, COM (2002) 341 final, p. 14.

of other actors developing private law as well as the needs and preferences of non-state actors.

8.5.3. Drawbacks

The following potential drawbacks of the OMC should not be overlooked:

1) A lack of openness and transparency.[1153]

Szyszczak[1154] has even stated that 'the approach of the OMC runs counter to the principles of good governance that have emerged (transparency, accountability, democratic input)' and has pointed to '[t]he lack of transparency and the failure to engage with the (more) democratic institutions of the EU'. However, part of this lack of transparency is also due to the technicality of some subjects.[1155] The Study Group on Social Justice[1156] has criticised the use of "technical language" and the evasion of political choices. Arguably, a lack of open debate is not specific to OMC, but if OMC is to be used, the use of technical terms is problematic, for example as it may entail that groups with considerable amounts of expertise, financial and organisation resources may gain 'privileged' access to the debate on European private law. Problems with regard to participation in the development of private law are already visible.[1157] These problems do not need to be reinforced by the OMC, especially as it fails to stimulate participation.[1158]

2) A lack of success in increasing debate.

The success of the OMC in increasing participation is subject to debate. Trubek and Trubek[1159] point out that while the Commission has evaluated the OMC in the area of the European Employment Strategy rather positively, [1160] other evaluations have been more critical, and note the lack of agreement of the success of this particularly well developed area in which the OMC is used. Szyszczak[1161] points out that positive evaluations of the OMC 'come from within', especially the Commission.

Accordingly, the Open Method of Convergence also emphasises the participation by expert actors, while less attention is given to the role, expectations, and preferences of, for example, contract parties. It is not clear how 'open' the process would be to actors that are affected by this strategy, but who have insufficient knowledge of private law to participate in debate. Unfortunately, it can be doubted whether affected actors that have not been included in the use of OMC have an action to secure access to OMC. [1162]

3) The success of OMC depends on the willingness of both state actors and non-state actors at the different levels to participate in this method.

[1153] V. Hatzopoulos, 'Why the Open Method of Coordination is bad for you: A letter to the EU', *ELJ*, p. 325.
[1154] E. Szyszczak, 'Experimental governance: The Open Method of Coordination', *ELJ* 2006, p. 495.
[1155] Comp. S. Borrás, B. Greve, 'Concluding remarks: New method or just cheap talk?', *JEPP* 2004, p. 333 point out that the OMC covers multiple policy areas: 'The more [OMC] grows, the less people will be able to read, understand and digest what is happening in the OMC process.'
[1156] Study Group on Social Justice in European Private Law, 'Social justice in European contract law: A manifesto', *ELJ* 2004, p. 653,
[1157] Comp. also the shortcomings in the use of networks, par. 8.2.3.2.
[1158] S. de la Rosa, 'The Open Method of Coordinaiton in new Member States – the perspectives for its use as a tool of soft law', *ELJ* 2005, p. 623, C. de la Porte, P. Nanz, 'The OMC – a deliberative-democratic mode of governance? The cases of employenet and pensions', *JEPP* 2004, p. 267.
[1159] D.M. Trubek, L.G. Trubek, 'Hard and soft law in the construction of social Europe: The role of the Open method of Co-ordination', *ELJ* 2005, p. 350-351.
[1160] Comp. the indeed rather positive evaluation of the European Employment Strategy, one of the well-established areas for the OMC with a Treaty basis: European Commission, *Taking stock of five years of the European Employment Strategy*, COM (2002) 416 final.
[1161] E. Szyszczak, 'Experimental governance: The Open Method of Coordination', *ELJ* 2006, p. 496. Accordingly, Comp. Ph. Syrpis, 'Legitimising European governance: Taking subsidiairyt seriously within the Open Method of Coordination', *EUI Working Paper* 2002, p. 38 is decidedly less optimistic on the European Employment Strategy.
[1162] V. Hatzopoulos, 'Why the Open Method of Coordination is bad for you: A letter to the EU', *ELJ*, p. 326.

Thus, the question may arise how OMC would work in practice. Notably, Hatzopoulos,[1163] presenting an overview of empirical research on the use of OMC, notes that OMC shows limited direct effects. However, if OMC is used in addition to existing harmonisation techniques, this may improve the effect of OMC.

Thus, the extent to which the OMC improves the responsiveness of private alw may be severely undermined.

8.5.4. Conclusion on the use of the OMC

Will the OMC contribute to a more responsive European private law? Although it might support the development of regulatory competition, which may enhance the quality of private law, the extent to which the OMC will enhance interaction between more actors should not be overestimated. Instead, use of the OMC may reinforce shortcomings already visible in the debate in European private law.

[1163] V. Hatzopoulos, 'Why the Open Method of Coordination is bad for you: A letter to the EU', *ELJ*, p. 309. Comp. also C. de la Porte, 'Is the Open method of Coordination appropriate for organising activities at European level in sensitive policy areas?', *ELJ* 2002, p. 56, finds that the diverse social models may also be relevant for the success of OMC in these areas.

8.6. Alternative techniques

What techniques can be used instead of currently used techniques to cope with problems of unpredictability, inconsistency, accessibility and responsiveness?

The paragraph will start by discussing alternative top-down techniques, some of which seem much less far-reaching than others. Paragraph 8.6.1. will discuss the use of Regulations rather than Directives and paragraph 8.6.2. will turn to optional regimes. Paragraph 8.6.3. will consider slightly more disruptive alternative techniques based on American examples. Paragraph 8.6.4. will analyse the use of collective bargaining and, paragraph 8.6.5 will end with a conclusion.

8.6.1. Implementation problems and strategies: Regulations instead of Directives?

This paragraph will ask whether the use of Regulations rather than Directives will improve the consistent and accessible development of European private law.

The use of Directives allows Member States a margin of appreciation that enables them to preserve a coherent set of national rules. Coherent national law increases the accessibility of private law for private parties at a national level. [1164] Secondly, Johnston and Unberath[1165] emphasise that Directives provide for more flexibility, in the legislative process. However, this benefit is not achieved[1166], as Directives frequently contain rather detailed provisions, and the CJEU has provided strict standards for the implementation by Member States in *Commission v The Netherlands*,[1167] and *Commission v Sweden*.[1168] Also, Directives that aim for maximum harmonisation leave little room for the national legislator.

The use of Directives also entails disadvantages that have become visible in the implementation of the *acquis* in the BGB and the BW. Member States have adopted different strategies in the implementation of the *acquis*, which has not helped the consistency of the *acquis* throughout the Union, nor is implemented law visible as such,. Which may inhibit accessibility, as the European background of a rule, and the corresponding need for harmonsied interpretation, are not visible.

The use of Regulations would remedy some of these weaknesses:

1) The use of Regulations, instead of Directives, would remedy the lack of accessibility and moreover have direct effect, which is in line with the aim of some of the measures in the *acquis* aiming to further consumer protection.[1169]

2) If the European legislator aims for maximum harmonisation, this may be achieved more easily through Regulations.[1170]

[1164] COM (2008) 614 final, p. 8.
[1165] A. Johnston, H. Unberath, 'Law at, to or from the centre?', in: F. Cafaggi (ed.), *The institutional framework of European private law*, Oxford: OUP 2006, p. 150-151.
[1166] Comp. also Ch. Twigg-Flesner, D. Metcalfe, 'The proposed consumer rights Directive – less haste, more thought?', *ERCL* 2011, p. 374.
[1167] CJEU 10 May 2001 (Commission v The Netherlands), C-144/99, [2001] ECR, p. I-3541, par. 17-18..
[1168] CJEU 7 May 2002 (Commission v Sweden), C-478/99, ECR [2002], p. I-4147, par. 21-23.
[1169] See for example N. Reich, 'A European contract law, or an EU contract law Regulation for consumers?', *Journal of Consumer Policy* 2005, p. 399.
[1170] W. van Boom, 'The Draft Directive on consumer rights: Choices made & arguments used', *Journal for Contemporary European Research* 2009, p. 457.

3) The use of Regulations rather than Directives may simplify the legislative process and relieve the legislative burden of states.[1171]

Accordingly, the Commission has recognised the benefits of Regulations.[1172] In the 2010 Green Paper on progress towards a European contract law,[1173] the Commission favours the use of a Regulation containing an optional instrument, emphasising that this choice would advance the internal market. Regulations have already been used in the harmonisation of international private law[1174] but also in the area of passenger rights.[1175]

However, do the disadvantages arising from the use of Regulations entail that the European legislator should continue to use Directives rather than Regulations? These disadvantages are:

1) The development of Regulations would entail the development of more sources simultaneously that may be simultaneously applicable, which is not likely to increase the accessibility of European private law.

2) The use of Regulations may mean that parties remain unaware of these rules and do not sufficiently rely on them, while implementation of the private law *acquis* in codifications increases the chance that private parties will consider these rules

3) The use of Regulations may raise questions with regard to minimum harmonisation. it is not clear whether the use of Regulations stands in the way of minimum harmonisation. This may inhibit the predictable development of private law.

On the one hand, minimum harmonisation is hard to reconcile with the ruling in *Variola v Amministrazione italiana delle Finanze*,[1176] where the Court decided that the effect of a Regulation does not depend on national laws. Member States may not obstruct this direct effect, and 'strict compliance with this obligation is an indispensable condition of simultaneous and uniform application of Community regulations throughout the Community'. Moreover, 'Member States are under an obligation not to introduce any measure which might affect the jurisdiction of the Court to pronounce on any question involving the interpretation of Community law or the validity of an Act of the institutions of the Community, which means that no procedure is permissible whereby the Community nature of a legal rule in concealed from those subject to it.' Arguably, if Member States would introduce more stringent rules, they oblige consumers and businesses to also inform themselves of national law, which may undermine accessibility and clarity, and raise questions on the competence with regard to the interpretation of provisions in the Regulation and national law.

On the other hand, if Regulations are adopted under article 114 TFEU, minimum harmonisation as such is not precluded.[1177] Furthermore, article 169 TFEU, which expressly allows for

[1171] A. Johnston, H. Unberath, 'Law at, to or from the centre?', in: F. Cafaggi (ed.), *The institutional framework of European private law*, Oxford: OUP 2006, p. 189-190, who for that reason suggest that in the review of the consumer *acquis*, the choice between Directives and regulations should be discussed.
[1172] European Commission, *Communication of the Commission, A Europe of results – Applying Community law*, COM (2007), 502 final, footnote 12.
[1173] European Commission, *Green paper on policy options for progress towards a European contract law for businesses and consumers*, COM (2010) 348 final, p. 9-10.
[1174] For example Regulation 2001/44 on jurisdiction and recognition and enforcement of judgments in civil matters, Regulation 864/2007 on the law applicable to non-contractual obligations, or Regulation 593/2008 on the law applicable to contractual obligations.
[1175] For example Regulation 2061/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.
[1176] CJEU 10 October 1973 (Variola S.p.A. v Amministrazione italiana delle Finanze), 34-73, ECR [1973], p. I-981, par. 9-11.
[1177] K. Gutman, *The constitutionality of European contract law,* 2011, p. 39. See also S.A. de Vries, *Tensions within the internal market – the functioning of the internal market and the development of horizontal and flanking policies*, Europa Law Publishing: Groningen 2006, p. 255, I. Wolff, *Die Verteilung der Konkretisierungskompetenz für Generalklauseln in privatrechtsgestaltenden Richtlinien*, Nomos: Baden Baden 2002, p. 156-157, S. Weatherill, 'Measures of consumer protection as impediments to export of goods', *ECRL* 2009, p. 153.

minimum, harmonisation is not limited to Directives, but speaks of "measures", which includes Regulations, adopted under article 114 TFEU or measures which support consumer protection measures by Member States.[1178]

►Thus, the use of Regulations may be beneficial for the consistency of the acquis throughout the Union, but it may simultaneously inhibit the consistent development of private law at the national level. Also, the use of Regulations clarifies the European background of a rule, which may contribute to accessibility. The use of Regulations may simulteanously inhibt accessibility as it leads to the development of more potentially overlapping sources, while parties may also not be sufficiently aware of the existence and the relevance of Regulations. Therefore, Regulations would hinder rather than help consistency and accessibility, and they should not be used as an alternative to contribute to these benchmarks.

8.6.2. Optional regimes

This paragraph will ask whether the use of optional regimes rather than traditional harmonisation may contribute to a more comprehensible European private law.

Paragraph 8.6.2.1. will consider optional regimes more closely and paragraph 8.6.2.2. will ask how optional regimes may contribute to the comprehensibility of European private law will be discussed. Paragraph 8.6.2.3. will turn to more general questions that should be addressed by actors drafting optional regimes. Paragraph 8.6.2.4. will end with a conclusion.

8.6.2.1. A closer look at optional regimes

Actors may develop optional regimes, i.e. optional sets of rules, which parties can opt for when entering into transactions. The subject and the scope of these optional regimes is decided by its drafters.

Optional regimes may entail opt-in as well as opt-out rules.[1179] Presently, article 6 CISG makes clear that the CISG establishes an opt-out system that moreover allows for derogation by contract parties, while article 3 of the proposal for a Regulation establishing a Common European Sales Law makes clear that parties can opt for the future optional instrument.

Optional regimes can be developed in various ways. Optional harmonisation has been established under article 114 TFEU[1180] although it has been doubted whether the proposed Regulation for a Common European Sales Law can be based on this article. Nevertheless, future initiatives in the area of insurance law have already been announced.[1181] The development of optional regimes gives rise to a number of questions:

1) What level of consumer protection would be considered satisfactory in optional harmonisation measures?

A starting point for the level of protection could be the level of protection offered in the consumer *acquis*. Yet problems may arise, on the one hand, when the level of consumer protection would make it unattractive for businesses to opt for optionally harmonised rules. Of course, it might be possible that

[1178] Comp. N. Reich, 'A European contract law, or a EU contract law Regulation for consumers?', *Journal of Consumer Policy* 2005, p. 400.
[1179] G. Bachmann, 'Optionsmodelle im Privatrecht', *JZ* 2008, p. 11 moreover distinguishes between strict and lenient options.
[1180] Before the proposal for a Regulation establishing a Common European Sales Law, COM (2011) 635 final, optional harmonisation was primarily used under article 114 TFEU to further the free movement of goods. See …
[1181] EU Justice Commissioner Viviane Reding meets with leaders of Europe's insurance industry, Press release MEMO/11/624 , 21 Sptember 2011, available at http://europa.eu/rapid/press-release_MEMO-11-624_en.htm.

businesses would be quite willing to accept a high level of consumer protection if that would mean they could apply one level of consumer protection throughout the Union when doing business with consumers.[1182] Interestingly, however, the reactions to other recent measures such as the consumer rights Directive[1183] from stakeholder organisations[1184] show that businesses may not necessarily plead for the highest level of consumer protection, but instead advocate a maximum harmonisation approach that will, in their view, ensure predictability and consistency. Therefore, it would be interesting to know whether businesses throughout the Union would be willing to accept a high level of consumer protection.

In contrast, a low level of consumer protection may be problematic. Whittaker[1185] has argued that a lower level of consumer protection than provided in national laws may give rise to questions whether standard terms applying the Optional Instrument to a business to consumer contract could be an unfair term in the meaning of Directive 93/13 or an unfair commercial practice in the meaning of Directive 2005/29. A lower level of consumer protection could prompt consumers to consider sellers who abide by national – higher – standards.[1186] In that case, the choice for an optional instrument by businesses might even inhibit cross-border trade.

2) The success of optional harmonisation depends on the adoption of optionally harmonised rules by private parties.[1187]

The attractiveness of optionally harmonised rules may well depend on the predictability and consistency achieved by such an Optional Instrument. However, in the Feasibility Study,[1188] as well as the subsequent proposal for a Regulation establishing a Common European Sales Law,[1189] frequently, concepts are used that would need additional interpretation. For example, what does the duty to negotiate in good faith (article 8) mean? What duties can be imposed on parties on the basis of this rule? How will courts interpret contracts if article 56 of the Optional instrument dictates that a contract is to be interpreted in accordance with parties' common intentions? What if parties are accustomed to relying upon the wording of the contract, having negotiated carefully on that wording? If parties can be bound by usages and practices, as stipulated in article 65, how will it be established that such a general usage exists? What future loss, in the sense of article 163 par. 2, is 'reasonably likely to occur'? Furthermore, especially in the earliest phase, when the Optional Instrument is just adopted, there would not be any case law on the interpretation of these terms and rules, which private parties and their advisors could turn to.[1190] Neither would there be an extensive amount of academic debate, as is the case in national jurisdictions. This might arguably set an optional instrument at a competitive disadvantage. The scope of optionally harmonised rules may also play an important role in the subsequent success of those rules.[1191]

[1182] K. Riesenhuber, 'A competitive approach to EU contract law', *ERCL* 2011, p. 129.
[1183] COM (2008) 614 final.
[1184] Available at http://ec.europa.eu/consumers/rights/responses_green_paper_acquis_en.htm#stakeholders. See for example the response from the British Retail Consortium that supports a fully harmonised and horizontal approach, stating that the review 'should not aim to extend the Acquis at the highest possible level' (p. 2). Similarly, Direct Selling Europe opposes the extension of consumer protection in the acquis and argues for consistency and predictability. eBay also pleads for full harmonisation, and abandoning minimum harmonisation which in the view of eBay has led to legal uncertainty. Similar responses have been made by other organisations, such as Platform Detailhandel Nederland, Retail Ireland, and the German Retail Federation. Comp. also the argument of J.W. Rutgers, 'An Optional Instrument and social dumping revisited', *ERCL* 2011, p. 350.
[1185] S. Whittaker, 'The Optional Instrument of European contract law and freedom of contract', *ERCL* 2011, p. 387-389.
[1186] M.B.M. Loos, 'Scope and application of the Optional Instrument', *CSECL Working Paper* 2011, p. 11.
[1187] This argument has been argued more extensively in E.A.G. van Schagen, ''The proposal for a Common European Sales Law: How its drafting might affect the optional instrument's added value for contract parties and its success', in: A.L.M. Keirse and M.B.M. Loos (eds.), *Alternative Ways to Ius Commune. The Europeanisation of Private Law*, Intersentia 2012, p. 85.
[1188] Expert Group, *A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback*, 2011, available at http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf.
[1189] COM (2011) 635 final.
[1190] W. Doralt, 'The Optional European Contract law and why success or failure may depend on scope rather than substance', *Max Planck Private Law Research Paper* 2011, p. 20-21.
[1191] Comp. A.G. Castermans, 'Multiple choice: Nationaal recht in het DCFR', in: M.W. Hesselink et al (eds.), *Het Groenboek Europees contractenrecht: naar een optioneel instrument?*, BJU: The Hague 202011, p. 33. See also W. Doralt, 'The Optional European Contract law and why success or failure may depend on scope rather than substance', *Max Planck Private Law*

3) Can optional harmonisation effectively be pursued by Directives, or does a choice for optional harmonisation also entail a choice for Regulations?

4) Is the possible future use of optional harmonisation a reason to abandon the fragmented approach visible in the private law *acquis*?

Thus, developing optional harmonisation necessitates more thought about these questions as they are important for the further development of the private law *acquis*.

Alternatively, "European" sets of rules have been established under article 352 TFEU.[1192] However, the use of article 352 TFEU may well be complicated further by the BVerfG Lisbon decision.[1193] In addition, sets of soft law such as the PECL can be developed, although opting for these sets of soft law as applicable law is not permitted under Rome I. Other options to establish optional regimes, currently not sufficiently considered in the drafting of a possible Common European Sales Law include enhanced cooperation, under which Member States enter into treaties in the sense of article 329 TFEU. So far, this possibility has led to the development of a regime in divorce law.[1194] Also, a German-French optional regime on matrimonial property law has also been established through a bilateral treaty.[1195] Alternatively, optional regimes on sales law in the EU may also be increased if the EU had the competence to accede to the CISG.

8.6.2.2. How can optional regimes contribute to more comprehensible European private law?

Smits[1196] describes three benefits that can be derived from optional harmonisation:

1) Optional harmonisation allows private parties to opt for either harmonised, national or international rules if that is in their own interests, which should increase the law's ability to respond to divergent preferences.
2) The development of optional rules could give rise to regulatory competition that should be beneficial for European private law in the long term.
3) Optional harmonisation could also provide an attractive alternative to full harmonisation of national private laws, establishing a level playing field that parties can opt into if they choose, while leaving Member States with discretion to develop national rules in accordance with the needs and preferences of their own legal order. Thus, petrification and lack of responsiveness that may follow from maximum harmonisation can be avoided while divergences of harmonised law throughout the Union are prevented as well.

8.6.2.3. Drawbacks

Importantly, the development of optional regimes also shows detriments that should not be overlooked:

Research Paper 2011, p. 13-15, as well as J. Kleinschmidt, 'Stellvertretung, IPR und ein optionales Instrument für ein europäisches Vertragsrecht', *RabelsZ* 2011, p. 538.

[1192] For example Regulation 1435/2003 on the Statute for a European Cooperative Society,

[1193] BVerfG 30 June 2009 2 BvE 2/08 u.a. *NJW* 2009, 2267.

[1194] See Council Decision 2010/405/EU, 12 July 2010, OJ L 189/12, of 22 July 2010.

[1195] See further S. Braun, 'Die Wahl-Zugewinngemeinschaft: Ein neuer Güterstand im deutschen (und französischen) Recht', *MittBayNot* 2012, p. 89.

[1196] J.M. Smits, 'Optional law: A plea for multiple choice in private law', *MJ* 2010, p. 350-351.

1) Developing optional regimes in addition to national, as well as other harmonised rules and international rules may inhibit the accessibility of European private law.

Both Cartwright[1197] and Mak[1198] have pointed to possible confusion that may arise when multiple instruments apply simultaneously – especially if those sources of law provide for different levels of consumer protection. This could for example be the case if the proposed optional instruments, the consumer law *acquis*, as well as national consumer contract law apply simultaneously, while also setting divergent levels of consumer protection.

2) The choice of parties for optional regimes is not necessarily a rational one, which may limit the extent to which private actors prompt legislators to participate in regulatory competition.

Arguably, a choice for an optional instrument does not have to be founded upon the superior quality of the instrument. Instead, the choice may also be traced to parties who are not aware that an optionally harmonised rule can be applied to the contract. Similarly, a choice against an optional instrument does not have to be based upon disapproval of the instrument, but based on, for example, model contracts that habitually opt out of optional instruments. Likewise, a choice to not opt for an optional instrument may be based on model contracts that do not contain an opt in clause, or, generally, an unwillingness to "try out" new law rather than familiar law systems.[1199] Cognitive limitations and biases may also limit the extent to which parties opt for an instrument that they are not familiar with.[1200] Notably, these flawed "choices" may undermine the idea of regulatory competition, as it makes clear that parties may not base their decisions on the quality of optional instruments – thus, the coexistence of these instruments does not necessarily lead to competition on the basis of the quality of those instruments, which also makes it less likely if competition occurs, this may not *necessarily* result in "better" law.

Despite shortcomings in the theory that private parties make rational choices between different legal regimes, legislators still choose to participate in regulatory competition.

Notably, in the drafting of optional harmonisation measures, actors will have to take possible problems with accessibility into account. Moreover, actors should not assume that parties will opt for an optional instrument because of its superior quality, even though problems of inconsistency and unpredictability may withhold actors from opting for an optional instrument.

8.6.2.4. Conclusion on the use of optional regimes

This paragraph has asked whether the use of optional regimes rather than traditional harmonisation may contribute to a more comprehensible European private law.

The development of optional regimes may entail that the ability of private law to better respond to varying preferences improves, while it also provides an attractive alternative to previously pursued maximum harmonisation. Moreover, the development of optional regimes may also stimulate regulatory competition.

Notably, optional harmonisation will likely result in a less fragmented harmonisation of private law, as the attractiveness of optional instruments also depends on their scope. The question arises, if optional harmonisation is not sufficiently successful, whether the European legislator turn towards more hierarchical approaches, perhaps, by transforming measures

[1197] J. Cartwright, '"Choice is good"." Really?', *ERCL* 2011, p. 344.
[1198] V. Mak, 'Hoe meer keus, hoe beter?', *TvC* 2010, p. 250.
[1199] S. Augenhofer, 'A Europen Civil law – for whom and what should it include? Reflections on the scope and application of a future European legal instrument', *ERCL* 2011, p. 211. Similarly, J. Cartwright, '"Choice is good"." Really?', *ERCL* 2011, p. 347 points out that businesses may be unwilling to act as "guinea pigs".
[1200] G. Low, 'The (ir)relevance of harmonization and legal diversity to European contract law: A perspective from psychology', *ERPL* 2010, p. 298-302.

pursuing optional harmonisation into measures pursuing partial harmonisation – i.e. measures imposing a harmonised set of rules for cross-border transactions.

However, the success of optional regimes depends on the question whether drafters of these regimes sufficiently consider crucial questions. Also, the development of optional regimes may undermine the accessibility of European private law as it leads to multiple overlapping sets of regimes. Moreover, regulatory competition need not necessarily lead to better law.

These potential drawbacks are however not sufficient reason to abandon the development of optional regimes, provided that drafters sufficiently take into account parties' preferences as well as the relation between optional regimes and other sources of private law.

8.6.3. American inspiration

Could techniques inspired by the U.S. legal order, especially the U.S. Restatements and model laws, contribute to the comprehensibility of European private law?

In particular, Restatements, similar to the DCFR, or model laws, could replace currently used techniques at the European level.This would however entail a significant change from the current private law *acquis*.

Paragraph 8.6.3.1. will consider techniques that have been compared to Restatements in the European legal order and paragraph 8.6.3.2. will ask whether current experences with Restatement-like instruments indicate that further use of these instruments, rather than the use of Directives and Regulations, should be used more, considering the comprehensibility of European private law. Paragraph 8.6.3.3. will consider whether model laws should be used if harmonisation is not feasible. Paragraph 8.6.3.4. will end with a conclusion.

8.6.3.1. The use of Restatements in the European legal order

Various similarities are visible between the U.S. Restatements and the DCFR, which were inspired by the U.S. Restatements:

1) The DCFR claims to restate existing law in blank letter rules, accompanied by comparative notes.[1201]

Gutman[1202] states that the aim of Restatements was not purely to 'restate' existing laws. Instead, Restatements should also consider 'situations not yet discussed by the courts or dealt with by the legislatures', as well as reflecting what the law should be if the law was not clear, and suggest changes. Consequently, Gutman describes the Restatements as 'theoretical hybrids' between descriptions of what the law is and what it should be.[1203]

2) Both the DCFR and the Restatements seek to establish systematisation.

[1201] H. *Schulte-Nölke*, 'Arbeiten an einem europäischen Vertragrecht –Fakten und populäre Irrtümer', *NJW* 2009, p. 2162, id., 'Restatement- nicht Kodifikation',in: O. *Remien* (ed.), *Schuldrechtsmodernisierung und Europäisches Vertragsrecht*, 2008, p. 26. See previously on Restatements chapter II (Methods to further comprehensible European private law) par. 2.3.1.

[1202] K. Gutman, *The constitutionality of European contract law*, Leuven 2011, p. 136.

[1203] See similarly, with interesting examples in the area of product liability, J. Zekoll, 'Das American Law Institute – ein Vorbil für Europa?', in: R. Zimmerman (ed.), *Globalisierung und Entstaatlichung des Rechts, Teilband II, Nichtstaatliches Privatrecht: Geltung und Genese*, Mohr Siebeck: Tübingen 2008, p.113-115. N, Jansen, *The making of legal authority, Non-legislative codifications in historical and comparative perspective*, Oxford: OUP 2010, p. 56-57 notes that the choice between purely describing or also prompting changes in the law was a source of debate and Restatements have both been criticised for purely describing the law and deviating too much from existing law.

Gutman[1204] holds that although the Restatements were not drafted in the form of a code, they are reminiscent of codes as they did intend to provide a *systematic* description of the law.

3) Both the DCFR and the DCFR seek to establish a common terminology[1205]

Hyland[1206] holds that a European codification should mainly seek to establish a common terminology and a structure that furthers debate, and should therefore be based on soft law such as the PECL and the UNIDROIT Principles. Accordingly, these sets of soft law already have been described as 'Restatements'.[1207]

Notwithstanding some similarities, the assertion that the DCFR was a 'Restatement' has been doubted by various authors who point to divergences between the DCFR and the American Restatements:

1) The DCFR has resulted in the proposal for a Regulation for a Common European Sales Law,[1208] but the Restatements are expressly aimed at the judiciary and they are not meant to be adopted as laws throughout the United States.[1209]

2) Rather than restating a black-letter rule of a complicated area of law, the DCFR seeks to formulate black-letter rules that are, as such, arguably not a re*statement* of existing law.

Notably, the Study Group on a European Civil Code took the PECL, formulated by the Commission on European contract law, the predecessor of the Study Group, as a stating point to draft the DCFR. The Commission recognised that the PECL did not serve to restate the law, but rather served as a starting point for a European Civil Code. As such, the Commission held that there is no common law in Europe that could be restated, and instead of being based on an already existing black letter rule common to the Member States, the Principles were therefore based on comparative law.[1210]

Schmid[1211] moreover points out that a Restatement "restating" existing law would necessarily include not only the *acquis*, but also, for example, CJEU case law on general principles of European law. Jansen and Zimmerman[1212] point out that especially for areas other than contract law, the argument that common rules – in the form of black letter rules, no less – can be found, overlooks the differences between national laws. Consequently, the DCFR contains rules that differ from national laws and such deviations should be justified more explicitly.

[1204] K. Gutman, *The constitutionality of European contract law* (PhD thesis Leuven) 2011, p.139. Comp. in the same sense C.U. Schmid, 'Legitimitätsbedingungen eines Europäischen Zivilgesetzbuchs', *JZ* 2001, p. 680, and id., 'Ways out of the maquis communautaire, On simplification and consolidation and the need for a Restatement of European primary law'*, EUI Working Paper* 1999, par. V.2: 'a legal text resembling a codification'.

[1205] K. Gutman, *The constitutionality of European contract law* (PhD thesis Leuven) 2011, p. 140-141.

[1206] R. Hyland, 'The American experience: Restatements, the UCC, uniform laws and transnational coordination', in: A.S. Hartkamp, E.H. Hondius (eds.) *Towards a European Civil Code*, 2004, p. 70-71.

[1207] For example by R. Goode, 'International Restatements of contract and English contract law', *Uniform Law Review* 1997, p. 231. C.U. Schmid, 'Ways out of the maquis communautaire, On simplification and consolidation and the need for a Restatement of European primary law', *EUI Working Paper* 1999, par. V.3 notes that Restatements should be made available in multiple languages, which should considerably further deliberation.

[1208] COM (2011) 635 final.

[1209] R. Hyland, 'The American experience: Restatements, the UCC, uniform laws and transnational coordination', in: A.S. Hartkamp, E.H. Hondius (eds.) Towards a European civil Code, 2004, p. 59. J. Zekoll, 'Das American Law Institute – ein Vorbil für Europa?', in: R. Zimmerman (ed.), *Globalisierung und Entstaatlichung des Rechts, Teilband II, Nichtstaatliches Privatrecht: Geltung und Genese*, Mohr Siebeck: Tübingen 2008, p. 112 however remarks that questions on the aim of the Restatements may receive multiple answers ('die Frage nach dem Zweck der *Restatements* [wird] bis zum heutigen Tage nicht einheitlich beantwortet').

[1210] The Commission on European contract law, *Introduction to the Principles of European Contract Law*, available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/survey_pecl.htm, expressly held that '[t]he Principles has therefore been established by a more radical process. No single legal system has been their basis. The Commission has paid attention to all the systems of the Member States, but not every of them has had influence on every issue dealt with. The rules of the legal systems outside of the Communities have also been considered. So have the American Restatement on the Law of Contracts and the existing conventions, such as The United Nations Convention on Contracts for the International Sales of Goods (CISG). Some of the Principles reflect ideas which have not yet materialised in the law of any state.'

[1211] C.U. Schmid, 'Legitimitätsbedingungen eines Europäischen Zivilgesetzbuchs', *JZ* 2001, p. 682.

[1212] N. Jansen, R. Zimmerman, 'Was ist und wozu der DCFR?', *NJW* 2009, p. 3403.

3) Whereas the Restatements focus on separate areas of law, the DCFR instead provides a systematisation of private law as such.[1213]

Is the DCFR a European equivalent of the Restatements? While the DCFR certainly differs from the Restatements as it does not restate the law, it adequately demonstrates what a European equivalent would look like.

The fact that the DCFR does not restate the law as such is not surprising, because of the differences between the U.S. and the European legal order [1214] The *acquis* is fragmented and there currently is no common law that is similar to a common law that can be deduced from the U.S. legal order. Moreover, it is unfortunate that the DCFR has been developed in spite of existing instruments – which it does not adequately take into account – rather than beong developed in close coordination with other instruments, as is the case for the Restatements. In this respect, the DCFR should take more note of the Restatements. The DCFR could also take the more transparent debate on the Restatements as an example.

Moreover, a recommendation to a European judiciary would be difficult as no hierarchical judiciary has been established to interpret and apply European law. Instead, national courts are also tasked with applying European law. However, the majority of decisions continues to be on national law, and courts correspondingly make use of sources on national private law rather than European private law.

Thus, the DCFR adequately reflects a European Restatement that is however in need for improvement.

8.6.3.2. Experiences with the DCFR and the Restatements

Do the experiences with the DCFR indicate that European Restatements should be used further or should their use be reconsidered?

Experiences so far do not indicate success. Interestingly, Jansen[1215] finds that one of the reasons that Restatements are so much more prominent in the U.S. legal order than the PECL and the DCFR may be that the Restatements were drafted as a response to a widely agreed 'crisis' in American private law and thus responded to a need of legal practice. The higher responsiveness of the Restatements enhances the chances that they are subsequently widely accepted and used in legal practice. In contrast, as Jansen points out, especially the PECL was not developed in response to a need expressed by legal practice, which considerably diminishes the chances for its subsequent use and acceptance by legal practice and judges. Accordingly, Jansen finds that it seems unlikely that actors will turn to European texts as primary sources or reflections of private law, unless European texts provide a clear added value to national texts for legal practice. This would be the case if

[1213] N. Jansen, R. Zimmerman, 'Was ist und wozu der DCFR?', *NJW* 2009, p. 3405, speak of 'systematisch verhärtern', also N, Jansen, *The making of legal authority, Non-legislative codifications in historical and comparative perspective*, Oxford: OUP 2010, p. 53.

[1214] Comp. for example, M. Reimann, 'American private law and European legal unification – Can the United States be a model?', *MJ* 1996, p. 217, emphasising that U.S. private law may not be as uniform as 'European observes' assume, while M. Reimann, 'Towards a European Civil Code: Why continental jurists should consult their transatlantic colleagues', *Tulane Law Review* 1998-1999, p. 1337, emphasises that European lawyers should look to the U.S. experience in codification as the U.S. legal order shows some important similarities with the European legal order, including the coexistence of common and civil law jurisdiction within a legal order. K. Gutman, *The constitutionality of European contract law,* Leuven 2011, p. 502-504, also points to differences between the U.S. and EU legal order when considering using 'American techniques" as a source of inspiration, and argues that the European legislator has a set of different techniques at its disposal that may be better suited for the EU legal order.

[1215] N, Jansen, *The making of legal authority, Non-legislative codifications in historical and comparative perspective*, Oxford: OUP 2010, p. 66, p. 51.

harmonisation of national private laws continues to the point that it replaces national private law as the primary source for private law. In that scenario, the relevance of national texts as sources of private law is severely diminished, and consequently, a European text would have a clear added value that is also apparent to legal practice.

Currently, Nilsen[1216] remarks that different from Restatements, the DCFR, as well other soft law principles, do not serve to improve accessibility but on the contrary are an "irritant" at the national level where there is no immediate need for soft law principles.

Notably, the criticism of the DCFR with regard to the confusion on the relation between the DCFR and the private law *acquis* and other soft laws indicates that the drafters of the DCFR should take more note of the development of the U.S. Restatements against the background of other measures. Thus, the UCC and the uniform an model laws, established by the National Conference of Commissioners on Uniform State Laws (the NCCUSL), the Restatements, formed by the American Law Institute (ALI), and the federal common law,[1217] as well as the division of competences between the federal and the state level in the U.S., should be considered in combination with one another. Accordingly, Gutman[1218] describes the development of the different techniques in the U.S. legal system as 'inextricably intertwined', and emphasises the influence of constitutional questions in the use of these techniques. Moreover, when comparing the drafting of the DCFR and the development of Restatements, the transparency in the U.S. debate sets a good example for the drafting of the DCFR.[1219]

Therefore, the extent to which the DCFR or other European "Restatements" currently contribute to benchmarks of predictability, accessibility, consistency and responsiveness is limited.

8.6.3.3. The use of model laws

Besides the American Restatements, the question arises whether the use of model laws[1220] can be a source of inspiration for actors in the European legal order.

U.S. model laws allow for amendments and are generally used in more controversial areas of private law – in the European legal order, examples of such areas are for example property or insolvency laws. Gutman [1221] compares the use of model laws with non-binding recommendations. Other instruments reminiscent of model laws have also been used in the European legal order:

1) Soft laws as well as international conventions, frequently use 'model rules', and legislators can use these rules as a source of inspiration when drafting legislation. However, this does not entail adopting a 'model law' but merely looking at the European level for incidental ideas.

[1216] N. Jansen, 'Dogmatising non-legislative codification. Non legislative texts in European legal discourse', in: R. Brownsword, H.-W. Micklitz, L. Niglia (eds.), *The foundations of European law*, 2011, via www.ssrn.com, p. 5.

[1217] See for a comparison between U.S. and EU 'federal common law' K. Lenearts, K. Gutman, '"Federal common law" in the European Union', *American Journal of Comparative Law* 2006, p. 1.

[1218] K. Gutman, *The constitutionality of European contract law* (PhD thesis Leuven) 2011, p. 102, 165.

[1219] Comp. J. Zekoll, 'Das American Law Institute – ein Vorbil für Europa?', in: R. Zimmerman (ed.), *Globalisierung und Entstaatlichung des Rechts, Teilband II, Nichtstaatliches Privatrecht: Geltung und Genese*, Mohr Siebeck: Tübingen 2008, p. 118-119, see in the same sense C.U. Schmid, 'Legitimitätsbedingungen eines Europäischen Zivilgesetzbuchs', *JZ* 2001, p. 681.

[1220] This does not includeuniform laws, the most prominent example of which is the Uniform Commercial Code. K. Gutman, *The constitutionality of European contract law* (PhD thesis Leuven) 2011, p. 502 emphasises the "American" understanding of uniform laws – which are intended to be implemented without amendments by state legislators. Uniform laws are particularly resorted to if convergence of state laws is considered desirable. Thus, uniform laws resemble current harmonisation initiatives and are therefore not considered as an alternative technique.

[1221] K. Gutman, *The constitutionality of European contract law* (PhD thesis Leuven) 2011, p. 503.

2) Divergent private laws throughout the Union may also inspire legislators. Admittedly, though, possible inspiration takes place in the absence of a "uniform" model rule.

3) Model laws drafted by international organisations such as UNCITRAL, as well as the legislative guides used in areas less likely to be harmonised.

Consequently, the use of model laws is not limited to the U.S. legal system. Yet their use in the European legal order may give rise to questions:

1) Are these instruments likely to be used in areas that show overlap with the private law *acquis*, especially if model laws are not attuned to the *acquis*?

For example, the UNCITRAL model law on cross-border insolvencies coexists with Regulation 1346/2000 on insolvency proceedings, and the UNCITRAL model law has mostly been adopted by states outside the Union. Notably, the Regulation contains rules for jurisdiction issues, applicable law and provisions on the effects of the initiation of insolvency proceedings on the rights of third parties, and the law applicable for a number of specified contract parties, as well as the recognition of insolvency proceedings. The contents of the model law on the recognition of insolvencies overlaps with some of these provisions, but the model laws also provides rules on cross-border cooperation for cross-border insolvencies. Notably, however, in the – postponed – revision of Dutch insolvency law, the expert committee did not only take into account the Regulation, but also considered the model law for insolvencies involving states outside the Union that fall beyond the scope of the Regulation.[1222]

2) Will the promotion of UNCITRAL of uniformity through model laws inspire the European legislator?

Several reactions are possible. If further harmonisation is not feasible, the Union may try to recommend its Member States to adopt the model laws provided by prominent international organisations. Alternatively, the Union may attempt to establish harmonisation in areas covered by model laws, as was the case in e-commerce. In 1996, UNCITRAL provided states with a model law on e-commerce. This prompted the Union[1223] to consider EU initiatives in this field in order to ensure a prominent role in international negotiations, which led to the adoption of Directive 2000/31 on e-commerce, whereas outside the European Union, most states have adopted laws based on the UNCITRAL model law.[1224] Thus, in these cases the harmonisation of laws at a European level may considerably diminish the influence of model laws.[1225]

3) If a model law is successfully used throughout the Union, will this bar the Commission's competence to initiate harmonisation in that particular field?

It is difficult to argue that divergences in private laws give rise to barriers to the internal market. Yet in the *Biotechnology* case,[1226] the CJEU ruled that unclarities or divergences in the interpretation of an international convention could give rise to barriers to the internal market, enabling the Commission to initiate harmonisation that would ensure autonomous interpretation of the rules in the convention

[1222] Commissie insolventierecht, *Voorontwerp Insolventiewet*, 2007, p. 4 (t).
[1223] European Commission, *Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market*, COM (1998) 586 final, p. 3.
[1224] UNCITRAL, *Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods*, Vienna 2009, available at http://www.cnudci.org/pdf/english/texts/electcom/08-55698_Ebook.pdf, par. 87.
[1225] See critically C. Hultmark Ramberg, 'The e-commerce directive and the formation of contract in a comparative perspective', *Global Jurist Advances* 2001-2, who criticises Directive 2000/31 for overlooking relevant international developments such as the UNCITRAL model law.
[1226] CJEU 9 October 2001 (Kingdom of the Netherlands v European Parliament and Council of the European Union), C-377/98, ECR [2001], p. I-7079, par. 19-20.

throughout the Union. Thus, the Commission may first try to recommend states to take model laws as starting points when they are revising areas of private law.

If a model law is especially successful, and states are able to observe the application of model laws in practice, they may be less likely to object. However, if states find they prefer a larger say in the harmonisation of private law in particular areas – if they prefer harmonisation at all – this is a reason to opt for harmonisation, as states may have less influence in the drafting of model laws by international organisations.

Is the use of model laws likely to contribute to benchmarks of predictability, accessibility, consistency and responsiveness?

The success of model laws depends on the use of model laws by the European legislator which may also influence the use made of model laws by states, if hamronisation measures diverge from model laws and do not leave room for the national legislator to take into account model laws. Model laws are however more likely to be successful than Recommendations and soft laws as states and the European legislator may observe more easily how model laws are used in practice, while the adoption of model laws by third states may encourage both national legislators and the European Commission to take these model laws into account, while their use does not necessarily bar harmonisation. Therefore, model laws may present an interesting alternative for the use of Recommendations and soft laws.

8.6.3.4. Conclusion on the use of American techniques

Is the use of European equivalents of the Restatements and model laws likely to contribute to the predictability, consistency, accessibility and responsiveness of European private law?

The European equivalent of the U.S. Restatements, in the form of the DCFR, is not likely to be as successful as the European equivalent, not only because of weakness in the drafting process in the DCFR that are not similarly visible in the U.S. legal order, but also because of the differences between the European and the U.S. legal order.

However, the use of international model laws may present an interesting alternative to hamronisation, particularly in areas less likely to be subject to harmonisation, and should be considered more prominently in improved consultations and impact assessments, provided that successful relevant model laws exist. Model laws may also be used as an additional technique that may precede harmonisation.

8.6.4. Collective bargaining

This paragraph will ask whether the use of collective bargaining can contribute to a more comprehensible European private law.

Paragraph 8.6.4.1. will address the various possible ways in which collective bargaining can be used. Paragraph 8.6.4.2. will identify potential problems. Paragraph 8.6.4.3. will end with a conclusion.

8.6.4.1. Suggestions for collective bargaining[1227]

Collins [1228] has suggested the formation of 'autonomous agreements' through collective bargaining under article 155 TFEU. Under article 155 TFEU, framework agreements have been considered as an alternative to traditional harmonisation in social policy areas.[1229] Collins [1230] points out that the participation of private parties ensures responsiveness, reflecting business needs and practices, and leads to a more balanced result than one-sided self-regulation.

If national actors seek to initiate collective agreements with actors at the European level, for example as they need to bargain with multinational organisations to adequately protect the interests of their members at a national level, European collective bargaining may have a clear added value for actors at the national level. For example, Schiek[1231] points to the initiative shown by various national unions to engage in collective negotiations with a transnational business established in accordance with the European Company Directive provided by Regulation 2157/2001.

Could collective bargaining at a European level also be undertaken for a limited amount of Member States, so that actors in a Member States that are familiar with collective bargaining for business to consumer transactions can enter into transnational framework agreements? This would enable other actors and other Member States to observe collective bargaining in a cross-border context on a limited scale. Also, it would be easier to achieve consensus on framework agreements if less parties that moreover have similar backgrounds are involved in framework agreements.

However, it may be doubted whether the Commission wants a 'two-speed Europe' – or several speeds Europe – where businesses from states not participating in the framework agreements have access to states participating in framework agreements without being bound to those agreements.[1232]

8.6.4.2. The need for inclusive and representative negotiations between equal parties

Collective negotiations should be inclusive and negotiations should take place between sufficiently representative parties with equal bargaining power. If this is not the case, agreements may become binding on parties that have had no chance to influence the process, which may severely limit the responsiveness of the outcomes of collective negotiations to society's – and contract parties' – views on justice.

In particular, problems of *Fremdbestimmung* may arise, and consequently, the outcomes of collective bargaining should but could not be subject to judicial evaluation in the

[1227] The suggestion in this paragraph differs from the previous suggestion to establish a 'European Self regulatory consultation system' by A.G. Castermans, 'Towards a European contract law through social dialogue', *ERCL* 2011, p. 366, as this form of self-regulation does not lead to framework agreements that can be transformed into binding law under article 155 TFEU. Comp. also J. Cartwright et al., 'Grensoverschrijdend contracteren? Dat lossen we zelf wel op', *NJB* 2011, p. 1250.
[1228] H. Collins, 'The freedom to circulate documents : regulating contracts in Europe', *ELJ* 2004, p. 798-802. D. Schiek, 'Autonomous collective agreements as a regulatory device in European labour law: How to read article 139', *Industrial Law Journal* 2005, p. 26 similarly argues that the 'European social dialogue' established under article 155 TFEU can be considered as an example for other areas of contract law. Also G. Guéry, 'European collective bargainign and the Maastricht Treaty', *International Labour Review* 1992, p. 583-584.
[1229] See previously par. 4.4.2.1.
[1230] H. Collins, 'The freedom to circulate documents : regulating contracts in Europe', *ELJ* 2004, p. 798-802.
[1231] D. Schiek, 'Autonomous collective agreements as a regulatory device in European labour law: How to read article 139', *Industrial Law Journal* 2005, p. 24.
[1232] H. Cullen, E. Campbell, 'The future of social policy-making in the European Union', in: P. Craig, C. Harlow (eds.), *Lawmaking in the European Union*, KLI: The Hague 1998, p. 275.

German legal order. Whittaker[1233] has questioned whether collective agreements violate the freedom of contract. Collins[1234] also points to the need to ensure the representativeness of the stakeholder organisations involved in the drafting process. Similarly, Schiek[1235] stresses the need for representativeness of stakeholder organisations participating in collective bargaining.[1236]

Accordingly, Member States frequently impose requirements with regard to the representativeness and insofar as they exist, these national requirements may be taken as a starting point to ensure the inclusiveness of European collective bargaining. In addition, collective bargaining at the European level may involve European stakeholder organisations (hopefully) representing these representative national stakeholder organisations. Lack of representativeness can be a ground for challenging the validity of Decisions. However, the CJEU[1237] has adopted considerable restraint in assessing the representativeness of parties admitted to collective bargaining. Furthermore, restrictions found in mandatory national law and the consumer law *acquis* as well as competition law should be taken into account.

8.6.4.3. Conclusion on the use of collective bargaining

Will collective bargaining, as an alternative to traditional harmonisation, contribute to the predictability, consistency, accessibility and responsiveness of European private law?

Extending framework agreements to consumer contract law may provide interesting alternatives that could be considered in more thorough impact assessment, especially if collective negotiations are also possible between actors from a limited number of Member States. This option would on the one hand allow for more experimentation, but on the other hand it would also lead to a two-tier Europe which is politically problematic and may lead to free-riders. Also, current safeguards to ensure the inclusiveness of framework agreements are not satisfactory and should be improved.

However, the success of framework agreements could be undermined as the scope of framework agreements may well be limited. Moreover, the success of this alternative depends on initiatives from private parties. The amount of initiative shown by stakeholders must however not be overestimated or taken for granted.[1238] Moreover, initiatives from stakeholders may not necessarily result in an agreement. The Commission[1239] has suggested that the Open Method of Coordination ('OMC') could be used to stimulate the involvement of relevant stakeholders, which has led to the adoption of frameworks of action.[1240] However, Smismans[1241] has argued that collective negotiations usually take place 'in the shadow of hierarchy', i.e. under the threat, for example, of legislative intervention, also due to unequal bargaining positions between labour and management.

[1233] S. Whittaker, 'On the development of European standard contract terms', *ERCL* 2006, p. 74.
[1234] H. Collins, 'The freedom to circulate documents : regulating contracts in Europe', *ELJ* 2004, p. 798-802.
[1235] D. Schiek, 'Autonomous collective agreements as a regulatory device in European labour law: How to read article 139', *Industrial Law Journal* 2005, p. 26
[1236] K. Armstrong, 'Rediscovering civil society: The European Union and the White Paper on Governance', *ELJ* 2002, p. 123 however argues that a distinciton should be made between the different sorts of stakeholders participating in the 'social dialogue', that consists of actors having to implement policies later agreed upon, actors whose interests are directly affected by the outcome of the process, as well as actors that represent a public interest while they are not directly affected by the outcome of the process. These actors, Armstrong argues, act in their own interest rather than 'public' interests.
[1237] CJEU 17 June 1998 (UEAPME v Council of the European Union), T-135/96, ECR [1998], p. II-2335, par. 88-89. See further previously par. 4.4.2.3.
[1238] Comp. H. Cullen, E. Campbell, 'The future of social policy-making in the European Union', in: P. Craig, C. Harlow (eds.), *Lawmaking in the European Union*, KLI: The Hague 1998, p. 274-275.
[1239] European Commission, *The European social dialogue, a force for innovation and change*, COM (2002) 341 final, p. 14.
[1240] For example the Framework agreement on gender equality.
[1241] S. Smismans, 'European social dialogue in the shadow of hierarchy', *Journal of Public Policy* 2008, p. 161 et seq.

8.6.5. Conclusion on the use of alternative techniques

What techniques could be used instead of currently used techniques that are likely to contribute to the comprehensibility of European private law?

The development of optional regimes seems an attractive alternative to maximum or minimum harmonisation, but the basis for optional harmonisation may be problematic under article 114 and 352 TFEU. In addition, the use of model laws also presents an interesting alternative to European measures, which can also be used in addition to subsequent traditional harmonisation, if it does not prove successful.

In contrast, the extent to which other alternative techniques can enhance the predictability, accessibility, consistency and responsiveness of private law is limited. The use of Regulations may inhibit accessibility and the use of European equivalents of Restatements have hitherto not indicated that this technique should be pursued further. Also, the use of collective bargaining may be problematic as it depends on the willingness of private parties, which should not be overestimated, and safeguards to establish inclusiveness and remedy *Fremdbestimmung* have not been established.

The suggestions for the use of alternative techniques all concern techniques that can be used at the European level. Notably, at the national level, the use of techniques may be less flexible – in the German and Dutch legal order, suggestions for alternatives to codifications and blanket clauses are problematic.

However, the alternative techniques may also be suitable to contribute to problems at the national level. The use of optional harmonisation may provide legislators with more room to maintain a consistent, predictable law within the framework of national law. The use of Regulations could take away national legislator's difficulties in implementing the private law acquis, although it would not contribute to the accessibility and consistency of law as it can leads to the simultaneous applicability of multiple sources.

Thus, interdependence becomes apparent; if actors at one level experience problems, initiatives from actors at other levels may resolve these problems, or reinforce problems. The use of Regulations moreover draws attention to actors' different understanding of benchmarks of accessibility and consistency.

The use of alternative techniques and other techniques may moreover show considerable overlap. Accordingly, the successful development of optional regimes, as well as Regulations and model laws, may arguably be considerably be enhanced through the use of networks and databases.[1242] Also, a better use of impact assessment may separately assess the use of alternative techniques, in particular the development of optional regimes and model laws. Consultations may evaluate whether actors are interested in these options, or whether they have objections to the use of these techniques.

[1242] See previously pars. 8.2.3. and 8.2.4.

8.7. Conclusion

In the development of private law through codification, soft laws, blanket clauses, and general principles, actors have not adequately taken into account that other actors also develop private law and that, therefore, the ability of actors to safeguard benchmarks of predictability, accessibility, consistency and responsiveness through these techniques has been diminished.

However, actors typically use techniques in addition to codifications, soft laws, blanket clauses and general principles, and in some cases, the use of alternative techniques, especially at the European level, is possible. What techniques can be used in addition to or instead of currently used techniques that will support the extent to which national techniques contribute to the predictability, accessibility, consistency and responsiveness of European private law?

Techniques should be combined with currently used top-down, hierarchical techniques that play a central role in the development of European private law. The suggestions for and the use of Regulations in the private law *acquis*, and the use of maximum harmonisation can also be seen in this light.[1243] This preference may be institutionally embedded at the European level, perhaps because the conferral of competences takes the European institutions as a starting point and suggestions and initiatives take place within the existing framework of these institutions. The preference for top-down techniques is echoed by non-state actors.[1244] For the Dutch legal order, Vranken[1245] notes that practitioners as well as scholars are often 'wired' to legal practice, and their reasoning is accordingly influenced. However, hard law may not necessarily be successful.[1246] Actors' expectations about the extent to which these hierarchical techniques contribute to benchmarks may be overly optimistic, especially if the existence of other actors is not taken into account, and should be adjusted accordingly.

Moreover, if the legislative process consistently shows severe shortcomings – which is currently not the case – and does not show improvement, formally democratically developed rules may *de facto* lead to *Fremdbestimmung*. The current shortcomings in the legislative process already make the need to use of additional and alternative techniques more visible and attractive. Specifically, the distinction between the development of private law by democratically elected state actors and non-state actors becomes smaller and the preference for democratically elected state actors over non-democratically elected state actors also becomes less convincing. Accordingly, Scheltema[1247] finds that the development of private law by the legislator is not necessarily preferable to the development of private law through case law – at least, the argument that the legislator should have a more prominent role as he is democratically legitimated, decreases significantly. Should the judiciary

[1243] More generally, the European Commission, *European governance: A White Paper*, COM (2001) 428 final also prefers a hierarchical approach.
[1244] See for example M. Storme, 'The foundations of private law in a multilevel structure: Balancing, distibution of lawmaking power, and other constitutional issues', *ERPL* 2012, p. 249, this preference has also been signalled by Buck-Heeb & Dieckmann 2010, p. 230.
[1245] Asser/Vranken 1-III (2005), nr. 140-143. S. Ferreri, 'General report: Sources of transnational law', *ERPL* 2012, p. 9-11, p. 29, p. 40 also finds that both practitioners and judges in many legal orders adopt a somewhat conservative approach to both foreign law and international law, and instead seem to focus on national law and national issues.
[1246] Comp. also H.-J. Mertens, 'Nichtlegislatorische Rechtsvereinheitlichung durch transnationales Wirtschaftsrecht und Rechtsbegriff', *RabelsZ* 1992, p. 219. This for example becomes visible from the late implementation of Directives, the restraint of some national judges in referring to European law or the CJEU, or the creation of precontractual duties in for example the field of consumer credit, which makes it more difficult for consumers to determine the costs of online credit , see the 2011 consumer credit sweep at http://ec.europa.eu/consumers/enforcement/sweep/consumer_credits/index_en.htm.
[1247] M. Scheltema, *Het recht van de toekomst* (inaugural address Utrecht),Kluwer: Deventer 2005, p. 9.

therefore play a more important role in providing guidelines for the interpretation of blanket clauses, and should the judiciary more generally play a more active role in the multilevel legal order? Should soft laws be a more prominent source in the interpretation of blanket clauses?[1248]

Instead of emphasising top-down techniques, actors should develop a combination of top-down and bottom-up techniques, and some areas of law have already been characterised as a hybrid of top-down an bottom-up approaches.[1249] Additional techniques that may contribute to the comprehensibility of European private law are:

1) The improved use of techniques to support the legislative process will increase to the extent to which codifications and blanket clauses contribute to benchmarks of predictability, consistency, accessibility and responsiveness.

The weaknesses in the use of codifications, soft laws, blanket clauses and general principles has been linked to criticism of the legislative process and arguments for more debate in European private law. Specifically, the use of consultations and impact assessments show serious shortcomings that are not remedied by other actors or techniques. Improvements of these techniques, and better use of networks and databases, may be a first step to deliberation.

2) The use of techniques in addition to blanket clauses will enhance the extent to which blanket clauses contribute to predictability, consistency, and responsiveness.

The use of guidelines and in the Dutch legal order, the newly introduced prejudicial procedure could also advance predictability and consistency. The responsiveness of private law may be enhanced if courts consistently use well-established and accepted alternative regulation in the interpretation of blanket clauses.

3) The study of STC's will increase extent to which national actors may contribute to the predictable development of the law through codifications and blanket clauses.

The predictable development of private law at a national level may benefit from studying STC's to identify potential areas for harmonisation, which may however also inhibit the consistent development of national private law. The exchange of information on STC's may also contribute to predictability.

4) The use of the OMC could contribute to regulatory competition, which could make actors more aware of areas of private law in need of improvement. In turn, reforming outdated areas of private law may contribute to the respponsiveness of private law.

Alternative techniques that could contribute to the comprehensibility are:

1) Optional regimes could facilitate the consistent and predictable development of private law within national codifications and enhace the capacity of law to respond to divergent preferences

2) Model laws could enhance the consistent development of private law throughout the Union, as model laws encourage convergence and states interested in adopting (parts of) successful model laws have the opportunity to see how model laws are applied in practice, which is beneficial for predictability.

[1248] Comp. R. Michaels, 'Umdenken für die UNIDROIT Prinzipien. Vom rechtswahlstatut zum Algemeinen Teil des transnationalen Vertragsrecht', *Rabels*Z 2009, p. 885.
[1249] Especially J. Basedow, 'The state's private law and the economy – commercial law as an amalgam of public and private rule-making', *American Journal of Comparative Law* 2008, p. 703, considering the circumstances under which state law or privately drafted rules may be developed.

The emphasis of this chapter has been on potentially successful additional and alternative techniques that are often bottom-up techniques, and the use of these techniques implies a shift towards the use of soft and bottom-up techniques. However, should soft or bottom-up techniques be used solely as a means to support the existing preferences for hierarchical techniques or is this view too narrow, overlooking instances in which "pure" bottom-up approaches are beneficial?

Currently, the preference for the use of "traditional" techniques has meant that potential techniques have been overlooked and that the strengths and weaknesses of various alternative techniques may not have been sufficiently thoroughly considered. German law rightly emphasises that the development of alternative regulation can have value in itself, as an exercise of constitutional rights. Even if the development of alternative regulation does not have a similar constitutional background, the ability of actors to develop and enforce their own rules is in accordance with the widely recognised principle of private autonomy and therefore has value in and of itself.

This does not mean that alternative regulation will necessarily be more successful than "traditional" legislation,[1250] but neither will legislation necessarily be more successful than alternative regulation. Unfortunately, the strengths of bottom-up techniques may be overlooked as the current use of bottom-up techniques does not remedy problems apparent in the use of techniques. Instead, the use of initiatives such as the OMC, but also collective bargaining, may reinforce problems in the legislative process. Thus, the drawbacks of bottom-up techniques should not be overlooked:

1) The development of bottom-up development takes time and its success depends on the initiatives from private parties.

Notably, the development of 'bottom-up' techniques also depends on the awareness of private actors of the possibilities to develop such initatives. As long as (many of) those initiatives do not seem to be progressing rapidly, 'bottom-up' techniques may take a long time to develop.

2) Some bottom-up initiatives do not adequately ensure representativeness and inclusiveness.

Presently, interesting starting points have resulted in debate with a limited number of highly qualified participants. It seems that in debate on 'European' private law prominent "European" stakeholders may play an important role.[1251] The suggestions for an Open Method of Convergence as well as the suggestion to develop a social dialogue also suggest the use of techniques which includes a limited number of highly qualified particpants. Notably, this small number of highly qualified participants may be beneficial for stimulating the exchange of rational arguments based on sufficient expertise. Notwithstanding the desirability of this exchange, however, the lack of participation from legal practitioners specialised in national law considerably weakens the debate in European private law, as it seems cut off from at least part of legal practice which, in many areas, is still predominantly national.

[1250] Comp. J. Köndgen, 'Privatisierung des Rechts', *AcP* 2006, p. 507-508, who, referring to the *Enron* and *Worldcom* cases, states that positive (criminal) law has failed rather than self-regulation. He emphasises that self-regulation is not intended to have preventive effect – instead, it can help the judiciary by indicating what behaviour can be expected from, for example, a particular profession. However, it seems that behaviour has not been in accordance with such rules, despite the involvement of relevant actors. This may form an indication against the argument that involvement of interested parties – such as professions – will strengthen compliance. Similar conclusions may also be drawn for corporate governance codes, see previouslypar. 5.4.2.3.

[1251] For example, the draftingof the Optional Instrument (see for the members of the stakeholder group http://ec.europa.eu/justice/contract/stakeholder-meeting/index_en.htm), Directive 2011/83 on consumer rights (see for the members of the stakeholder group http://ec.europa.eu/consumers/rights/cons_acquis_en.htm). Comp. also the members of the Round Table on Travel Contracts, on the review of Directive 90/314 on package travel (see for the members of the group http://ec.europa.eu/consumers/cons_int/safe_shop/pack_trav/pack_trav03_en.pdf) Comp, also S. Grundmann, J. Stuyck, 'An academic Green Paper on European contract law – Scope, common ground and debated issues', in: S. Grundmann, J. Stuyck, (eds.), *An academic Green Paper on European contract law*, KLI: The Hague 2002, p. 7-8.

Consequently, it does not seem likely that legal practice will develop much initiatives even if additional or alternative techniques provide room for actors to do so.

In the use of additional and alternative techniques, interdependence becomes visible:

1) If actors use techniques in addition to already used techniques, they can compensate for the weaknesses of a particular technique or reinforce other actors' initiatives.

Thus, the use of national consultations and impact assessments may reinforce interaction in the debate on private law at the European level.

2) Unfortunately, the use of additional and alternative techniques may also undermine other actors' initiatives.

Thus, the use of Regulations instead of Directives would make it considerably more difficult for legislators to maintain the consistent and accessible development of private law within national codifications. Moreover, banning national, well-established and accepted alternative regulation as a relevant source for the interpretation of blanket clauses in the private law *acquis* and introducing comitology may lessen the responsive interpretation of blanket clauses.

Actors are also dependent on one another for the successful use of alternative and additional techniques, which becomes apparent in various ways:

1) National state actors are better placed to encourage national actors to participate in debate – but this will not contribute to responsiveness if the responses are not taken into account. Similarly, organising national impact assessments is not going to lead to more evidence-based debate if they do not play a role in further debate.
2) The suggestion to use the OMC to encourage regulatory competition should not overlook that, despite European encouragement, states may choose not to amend their laws, which may severely undermine the success of the OMC.
3) The possibility to develop optional regimes makes clear that the preferences of non-state actors who will might make use of these optional regimes should be taken into account. Logically, if optional regimes are not in accordance with non-state actors' needs and preferences, this diminishes the chance that these actors will subquently opt for it.
4) The suggestion for bottom-up techniques more generally draws attention to the dependance on private parties for the success of these techniques. Referring to alternative regulation in the interpretation of blanket clauses presupposes that private parties have drafted or participated in the drafting of alternative regulation, and framework agreements may similarly only be transformed into binding law if parties enter into collective negotiations with one another.

This chapter has argued that interaction in the development of European private law should be more like deliberation. Notably, deliberation refers to legislation, as the drafting of alternative regulation may be open to a limtied group of participant, while alternative regulation may also not be as accessible as legislation. Nevertheless, more interaction that moves towards deliberation may also benefit the development of additional and alternative techniques, and the development of alternative regulation may also enhance deliberation:

1) Deliberation should involve discussing critically which techniques would be most suitable for European private law, which may point to the use of other techniques than traditional legislation.

2) Typically, bottom-up techniques depend on participation and debate and may therefore benefit considerably from deliberation. Also, framework agreements could gain from deliberation.
3) Interaction will benefit from the use of additional or alternative techniques.

In particular, interaction will benefit from the improved use of networks and databases. Also, it has been argued that OMC recognises the coexistence of actors and encourages 'power-sharing' and 'mutual problem solving', which makes the need for interaction between participating actors apparent.[1252] However, the success of the OMC in facilitating interaction is subject to doubt. There are also arguments that collective bargaining could improve debate. Schiek [1253] emphasises that collective bargaining at the European level fits in the multilevel legal order in which actors become increasingly interdependent, providing arrangements that are relatively flexible when compared with European or national legislation. However, extending framework agreements to private law may be problematic, especially if the inclusiveness and representativeness of actors is not yet sufficiently guaranteed. Moreover, Armstrong[1254] points out that collective negotiation processes at the European level typically only include actors at the European level that moreover *negotiate* to achieve an agreement, whilst pursuing their own interests.

The distinction between additional and alternative techniques is not a sharp distinction; some techniques used in addition to currently used techniques, such as the OMC, may, if successful, be used instead of traditional harmonisation techniques.

The choice for these techniques depends on actors' preferences and their views on the benefits and weaknesses of additional or alternative techniques – however, the preferences of different actors for particular techniques may differ. Thus, an abstract evaluation of the benefits of legislation, and alternative or additional techniques will not be made. Also, the choice for "optimal" techniques is not a definitive choice, but may also change over time, as the roles of actors change.

[1252] J. Scott, D.M. Trubek, 'Mind the gap: law and new approaches to governance in the European Union', *ELJ* 2002, p. 6
[1253] D. Schiek, 'Autonomous collective agreements as a regulatory device in European labour law: How to read article 139', *Industrial Law Journal* 2005, p. 27, 33.
[1254] K. Amstrong, 'Rediscovering civil society: The European Union and the White Paper on Governance', *ELJ* 2002, p. 123-124.

Chapter 9: The development of the law on standard contract terms

9.1. Introduction

The previous chapters have considered the role of actors in the German and Dutch legal orders in the development of private law and the use of techniques in the multilevel legal order. Although the role of actors beyond the national level and non-strate actors differs in the German and Dutch legal order, these differences have not resulted in a different use of techniques by state actors. However, differences in the development of alternative regulation have been discovered.

The previous chapters have considered that generally, both state and non-state actors show a preference for a hierarchical development of private law. It was also concluded that the coexistence of actors may be beneficial if actors manage to benefit form one another's insights and experiences, whereas coexistence may be problematic if actors ignore that other actors also develop private law and that the use of techniques by other actors may therefore be relevant when pursuing benchmarks of predictability, accessibility, consistency, and responsiveness.

Can the extent to which a particular area of law meets benchmarks of predictability, consistency, accessibility and responsiveness be traced to the coexistence of interdependent actors and the interaction between these actors?

Studying a particular area of law more closely may also be valuable because the optimal use of techniques may change over time, and depends on the degree of European integration as well as the area of law. Thus, some areas of law, such as timeshare, develop rapidly, which necessitates the use of techniques that allow for sufficient flexibility. Also, some areas of private law, such as insolvency law or property law, may be politically sensitive, which may decrease state actors' willingness for harmonisation. In contrast, other areas are not as sensitive, and may allow more easily for European initiatives – such as contract law. Alternatively, some areas consist of a relatively high number of mandatory rules – for example consumer law – which may make it more likely that parties in cross-border trade are confronted with two sets of inconsistent mandatory rules. In some areas of private law, such as property law, the need for predictability is emphasised.

Consequently, the question whether the coexistence of actors is problematic or beneficial can be answered for separate areas of the law. Accordingly, this part of the research will turn to contract law, in particular to the law on STC's. The case studies will consider whether actors have taken into account that other actors also develop private law, which limits the extent to which national techniques may contribute to benchmarks of predictability, accessibility, consistency, and responsiveness, whether actors have interacted with each other accordingly, and how this has affected the law on STC's in terms of these benchmarks.

Mere interaction does not suffice; instead, debate should meet the following requirements:[1255]

1) Representativeness

[1255] As previously discussed in par. 8.2.

2) Inclusiveness
3) Openness and transparency
4) Actors should be able to gain an overview of debate
5) Actors should not use debate primarily to pursue their own interests

Moreover, interaction between actors should serve to make actors aware of interdependence, and adjust the use of their techniques accordingly.[1256]

Especially in the German legal order, but also in the Dutch legal order, the law on STC's is generally considered to be of good quality. Does that mean that actors have recognised interdependence has developed and interacted accordingly, or not?

Paragraph 9.2 will discuss the choice for the law on STC's. Paragraph 9.3 will discuss which actors coexist in the German and Dutch legal order, and whether interdependence between actors has developed. Paragraph 9.4 will end with a conclusion and sketch the approach in chapters 10, 11 and 12.

9.2. The choice for a case study

This paragraph will consider the choice for the law on STC's. Paragraph 9.2.1. will consider the dilemma's accompanying the choice for a case study and paragraph 9.2.2. will discuss the choice for the law on STC's.

9.2.1. Dilemma's

In the choice for an area of law for a case study, several dilemmas may arise. Choosing a "national" area of law such as the law on the transfer of real property may not make apparent whether the simultaneous use of techniques by multiple actors is problematic, because not many techniques are used simultaneously in these areas, and the development of those areas remains, by definition, predominantly national. Yet opting for "hybrid" areas that develop functionally and where the difference between public and private law is less apparent, such as for example labour law or company law, may be problematic because the development of law in these functional areas can be considered "atypical" for areas of "traditional" private law. Alternatively, in "European" area of law, many actors coexist, which may lead to arguments that this area is similarly atypical and that the conclusions with regard to this area are not relevant for other "traditional" areas.

Arguably, choosing an area of European private law where many actors coexist provides an opportunity to look at the simultaneous development of European private law by different actors. Moreover, the number of actors involved in the development of European private law is not likely to become smaller over time, which may also make the conclusions of the simultaneous use of techniques alongside one another interesting for other areas of private law, especially considering the developments in "traditional" areas of private law.[1257]. Mandatory rules in traditional areas such as property law may also be difficult to reconcile with the rights to free movement within the European Union, or, eventually, if they pose justifiable barriers to trade, they may become harmonised.[1258] Thus, "national" areas of private law can also look to the development of other areas of private law if and when

[1256] See previously par. 8.7.5.
[1257] Comp. the proposal for a Directive on credit agreements relating to residential property, COM (2011) 142 final.
[1258] See further on the compatibility of property law and European law B. Akkermans, E. Ramaekers, 'Free movement of goods and property law', *Maastricht European Private Law Institute (M-EPLI) Working Paper 26/2011,* available on www.ssrn.com.

increased international trade necessitates the development of for example, European initiatives on the registration of immovable property in national registers.

9.2.2. The law on STC's

STC's are important for both national and international trade. STC's have even been described as "principles" of European contract law, more so than the PECL, because of their central importance to legal practice, and the European legislator agrees.[1259] Contract law plays a central role for the inclusion of STC's in contracts, the interpretation and the validity of STC's.[1260] The case study will look at the use of techniques by multiple actors in the development of the law on STC's. Thus, this case study is not aimed at studying the use of STC's as an additional technique that may make clear which differences in private law are problematic for the internal market.[1261]

Studying this area of law may prove interesting as STC's are used widely, both in B2B contracts and B2C contracts. Therefore, the research would consider an area where parties may have to deal with mandatory law provisions as well as an area where parties largely decide for themselves which STC's to include. It is moreover an area of private law where many techniques have been used alongside one another, and where it is therefore possible to see whether the simultaneous use of techniques by multiple actors has been problematic or beneficial, or both. It is moreover an area where relevant previous comparative law research already exists,[1262] which may facilitate a comparative law case study.

Which characteristics in this area of law may be important for an optimal use of techniques?

i) The law on STC's has developed rapidly and therefore the law should be able to adequately respond to changing practices, in accordance with society's views on justice.
ii) Contract law typically facilitates entering into contracts, which requires an approach that is predictable, consistent and accessible.
iii) Much alternative regulation has developed, and the law should accordingly leave sufficient room for alternative regulation, unless that leads to *Fremdbestimmung*.
iv) The law on STC's has been subject to considerable harmonisation, as part of consumer contract law consists of mandatory law that may in the eyes of the European legislator give rise to barriers to the internal market.

Arguably, conclusions drawn from this case study may be especially interesting for areas of law with similar characteristics – quickly developing areas of law, with both mandatory and default rules, where alternative regulation has developed or may still develop, or where harmonisation measures have developed or may develop. Also, the conclusions on the

[1259] Communication from the Commission to the European Parliament and the Council*, A more coherent European contract law: An action plan*, COM (2003) 68 final, p. 21 et seq.
[1260] Looking at STC's themselves may reveal that the validity of STC's may not only depend on contract laws, but also on, for example, national property laws, or civil procedure laws. Although it makes clear that the different areas of law should not be seen in isolation from one another, these areas of law are not included in the case study. Notably, this case study concentrates on the use of techniques in the development of the law on STC's rather than the cross-border effectiveness of STC's themselves. This case study will also not separately consider private law that may be relevant for negotiations such as the question whether parties breaking off negotiations may be liable for precontractual damages.
[1261] See previously on this question par. 8.4.
[1262] For the Dutch legal order prominently E.H. Hondius, *Standaardvoorwaarden. Rechtsvergelijkende beschouwingen over de standaardisering van kontraktsbedingen en overheidstoezicht daarop*, 1978 and more recently R.H.C. Jongeneel, *Algemene voorwaarden en het AGB-Gesetz*, 1991. Comparative information on the implementation of Directive 93/13 can be found in the EC Consumer Law Compendium (the CLABB-database is no longer available).

development of the law on STC's also affect more general questions of contract law, and may therefore be interesting for the use of techniques in the area of contract law more generally.

9.3. Which actors coexist and has interdependence developed?

This paragraph will ask what actors develop the law on STC's in the German and Dutch legal order and whether interdependence has developed between what actors.

Paragraph 9.3.1. will consider which actors have played a role in the development of the law on STC's, and paragraph 9.3.2. will consider interdependence. Paragraph 9.3.3. will end with a conclusion.

9.3.1. Actors developing the law on STC's

The law on STC's has been developed by various actors:

1) The German and Dutch legislator have developed general contract law as well as specific provisions for STC's. National legislators have established private international law on the jurisdiction, applicable law and the execution of foreign decisions relating to STC's.

2) The European legislator has developed various measures on the law of STC's.

These measures are Directive 93/13 on unfair contract terms as well as other Directives that may affect the content and judicial evaluation of STC's. Thus, article 7 Directive 2011/7 on late payment stipulates that terms on the date or period of payment, interest, or recovery costs that are grossly unfair to the creditor shall either be unenforceable or give rise to damages. Article 7 provides a number of criteria to establish whether a term is grossly unfair. Also, article 4 par. 4 Directive 90/314 on package travel limits the possibility to change the price of package travel when the contract has already been concluded. Also, Directive 2008/48 on consumer creditor and Directive 2007/64 on payment services have affected STC's in contracts between German banks and other creditors and consumers.[1263] Moreover, other Directives that do not directly stipulate on the unfairness of contract terms may be relevant for assessing whether a term is fair or unfair, for example by guaranteeing an intellectual property right.[1264] Moreover, other Directives[1265] also contain blanket clauses referring to 'good faith', although this does not mean that article 3 Directive 93/13 has to be interpreted consistently with these clauses.

Other Directives may also be applicable for consumer contracts containing unfair terms: Directive 2000/31 on e-commerce, Directive 97/7 on distance contracts, to be replaced by Directive 2011/83 on consumer rights, as well as timeshare contracts falling under Directive 2008/122 or credit contracts falling within the scope of Directive 2008/48 – or contracts may fall under all these Directives, if a timeshare contract linked with a credit agreement is entered into from a distance. Unfair terms may also constitute an unfair commercial practice under Directive 2005/29. Furthermore, Annex A to Directive 2003/55 also contains provisions on consumer contract law.

The European legislator has established rules on private international law on the jurisdiction, applicable law and the execution of foreign decisions relating to STC's in Regulation 44/2001 ('Brussels I') and Regulation 593/2008 ('Rome I').

For cases falling within the scope of Rome I, the competence to determine whether German or Dutch law on STC's – or other law – is applicable has also been reallocated to the European level. For B2C

[1263] See in more detail Ulmer/Brandner/Hensen/AGB-Recht/Fuchs, Specific STC's, Banks, nr 1-2.
[1264] OLG Stuttgart 3 November 2011, *BeckRS* 2012, 5352.
[1265] Comp. for example article 3 par. 1 Directive 86/653 on self-employed commercial agents and article 3 par. 2 Directive 2002/65 on distance contracts for financial services.

contracts, in addition to article 6 par. 2 Rome I, and similar to various Directives in the private law *acquis*, article 6 par. 2 Directive 93/13 stipulates that a choice of law may not deprive the consumer of the rights conferred upon him by the Directive.

For cases falling within the scope of Brussels I, the competence to determine which judge will be competent to hear a dispute has been reallocated to the European level. The CJEU[1266] has made clear that the validity of a clause making a choice of jurisdiction can only be evaluated by the standards of article 23 Brussels I. This means that article 23 Regulation precedes article 305 BGB, and articles 6:233 sub b and 6:234 BW for determining whether a clause indicating a choice of jurisdiction has been validly entered into and has become part of the contract, as well as the criteria in article 307 BGB and article 6:233 sub a BW on the fairness of these clauses. Yet in some cases, provisions in the private law *acquis* may precede questions of private international law; thus, in Oéano,[1267] and subsequent case law,[1268] Directive 93/13 stood in the way of jurisdiction clauses in B2C contracts, and in Ingmar/Eaton,[1269] the applicability of Directive 86/653 preceded a valid choice of law.

3) The UN has established the CISG.

The CISG is applicable if parties have not opted out of it. If parties have made a choice for Dutch or German law, article 1 par. 1 sub b CISG entails that this does not exclude the applicability of the CISG.[1270] The CISG may precede national law.[1271] Articles 14-24 CISG have precedence over articles 305 pars. 2 and 3 BGB as well as articles 6:233 sub b and 6:234 BW on the valid inclusion of STC's.[1272]

The CISG may coincide with Rome I. Should the question which law is applicable in international business to business (hereafter: 'B2B') contracts be decided under article 1 CISG or under Rome I? It has been argued that if both contract parties are settled in a contracting state, that have not made reservations under article 95 CISG, the CISG should in those cases determine the question of applicable law.[1273] If that is not the case, the CISG can become applicable if private international law indicates the application of the law of a contracting state. Article 25 Rome I explicitly recognises the precedence of multilateral treaties concluded between Member States such as the CISG. Accordingly, questions of applicable law are decided under the CISG rather than Rome I. A choice for German or Dutch law may however not necessarily exclude the CISG, depending on the wording of the choice of law.

If the CISG is applicable despite the choice for German or Dutch law, German or Dutch lawmay be applied to fill gaps.[1274] In accordance with article 4 sub a CISG, the evaluation of STC's in contracts applying the CISG is subjected to article 307 BGB and article 6:248 BW, although the evaluation has to take into account the standards established in the CISG. If the ineffectiveness of STC's give rise to gaps, these are to be filled in accordance with article 306 par. 2 BGB, as well as article 7 CISG.[1275]

[1266] CJEU 16 March 1999 (Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA), C-159/97, [1999] ECR, p. I-1597.
[1267] CJEU 27 June 2000 (Océano Grupo Editorial SA v Quintero and others), Joined cases C-240/98 to C-244/98, [2000] ECR, p. I-4941.
[1268] CJEU 4 June 2009 (Pannon GSM Zrt v Győrfi), C-243/08, [2009] ECR p. I-4713.
[1269] CJEU 9 November 2000 (Ingmar/Eaton), [2000] ECR p. I-9305.
[1270] Ferrari/Kieninger/Mankowski et al/ Internationales Vertragsrecht/Saenger (2011) article 6 CISG, nr 4, who points out that if parties agree that the BGB is applicable, this entails that parties have opted out of the CISG. See for Dutch law Rb. Arhem 29 July 2009, LJN BJ4645, Rb Zwolle 22 January 2003, *LJN* AF3345.
[1271] In the German legal order, the CISG has been implemented into national law. Thus, the statute implementing the CISG sets aside other national laws.
[1272] Ferrari/Kieninger/Mankowski et al/ Internationales Vertragsrecht/Saenger (2011) article 4 CISG nr 23.
[1273] Ferrari/Kieninger/Mankowski et al/ Internationales Vertragsrecht/Saenger (2011) article 1 CISG nr 14, comp. for Dutch law also Hof 's-Hertogenbosch, 13 November 2007, RCR 2008, 18.
[1274] Ferrari/Kieninger/Mankowski et al/ Internationales Vertragsrecht/Saenger (2011) article 6 CISG nr 4 notes that an explcit chocie for the BGB will generally exclude the CISG but a mere choice for German law will not necessarily lead to exclusion of the CISG as the CISG has been incorporated into German law.
[1275] Ulmer/Brandner/Hensen/AGB-Recht/Schmidt (2011) annex to article 305, nr 10.

4) Other international organisations have also established treaties relevant for the law on STC's.

Contracts may also be concluded under other international regimes, especially in the area of transport.[1276] Important regimes in this area include the CMR as well as the Montréal Convention, adopted by the EU through Regulation 889/2002. Also, treaties have been established for particular clauses, in particular the Benelux Convention on Penalty Clauses. The 2005 Hague Convention on choice of court clauses may become relevant once it enters into force.

The CJEU[1277] has held if the rights of third states are not involved, Member States may not rely on treaties to limit from the freedoms provided by the Treaty. Consequently, if European measures and treaties collide, the question should not be whether the treaty provides an exclusive regime, but whether the treaty provides sufficient predictability and does not limit cross-border trade. It is unclear how this should be determined.

The CMR and the Montréal Convention may well overlap with European measures. The CMR may show overlap with Brussels I. The CJEU[1278] has held that article 71 Brussels I may not entail that treaties falling within the scope of the Regulation may provide for less beneficial effects than provided for by the Regulation. Tthe rules in treaties may be applied if they provide a high degree of predictability, facilitate the administration of justice and limit the risk of parallel procedures.

5) International non-state actors such as the ICC have developed alternative regulation that may reflect customary law or that may indicate well-established business practices.

6) Non-state actors at the European level have developed alternative regulation.

Alternative regulation has also been established by the Economic Commission for Europe (ECE) provided standards forms of contracts and general conditions of sale to facilitate international commercial contracting.[1279]

7) Academic groups have developed soft laws that parties may choose to incorporate into their contracts.

Thus, various actors have developed the law on STC's. Although the national and the European legislator play an important role, actors at the international level may also play a role.

9.3.2. Interdependence between actors

In the law of STC's, various instances of interdependence arise:

1) The competence of the national legislators to develop the law on STC's in consumer contracts has been reallocated to the European level

What does that mean for the development of the law on STC's?

[1276] See further Baumbach/Hopt/Handelsgesetzbuch/Hopt (2012) introduction before article 1, nr 27.
[1277] CJEU 22 September 1988 (Ministère Punlic/Deserbais), case 286/86, [1988] ECR, p. 4907.
[1278] CJEU 4 May 2010 (TNT/Axa Versicherung), C-533/08, [2010] ECR, p. I- 4107.
[1279] UNCITRAL Report of the Secretary-General, 23 September 1966, Sixth Committee, doc.no. A/6396, par. 67, referring to the ECE General Conditions of Sale and Standard Forms of Contract.

i) Both the German and Dutch legislator need to take into account the possible reform of Directive 93/13. They may participate in the drafting process of a new Directive, but it is possible that the Directive is reformed in a manner contrary to the preferences of both Member States.

ii) In the reform of national law, national legislators need to take into account existing and new harmonisation initiatives.

This means, for example, that national legislators may not establish that article 307 BGB or article 6:233 sub a BW is not mandatory law – although such initiatives are highly unlikely. However, as Directive 93/13 aims for minimum harmonisation, national legislators remain competent to, for example, expand the black or grey lists of unfair clauses. This might de different if a future revised Directive aimed for maximum harmonisation and the European model list became binding. If the European legislator were to opt for a Regulation instead of a Directive, this may even draw the admissibility to maintain articles 305-310 BGB and articles 6:231-247 BW for consumer contracts into doubt.

iii) National legislators are less able to guarantee the accessibility of private law.

Through codifications, the German and Dutch legislator increased accessibility as parties no longer had to look at various case law, mandatory provisions scattered over multiple laws and default rules in national law. Instead, parties could take the BGB or the BW as a starting point to determine which terms were acceptable or unacceptable. As the EU has developed separate laws containing specific provisions on STC's, and as CJEU case law from the CJEU develops, this undermines accessibility.

National legislators seeking to improve accessibility must therefore adopt a strategy to deal with the development of rules in specific European measures, for example by implementing the separate provisions on STC's within articles 305-310 BGB or articles 6:231-247 BW. Moreover, state actors should be more active in promoting the need for the accessible development of private law at the European level.

iv) National legislators are less able to guarantee the consistent development of the law through codifications.

While codifications help to ensure the consistent development of the law, the European legislator does not take a similar perspective and has harmonised fragmented parts of the law. The inconsistencies visible in the private law *acquis* undermine the consistency of the law in codifications.

v) National legislators are less able to guarantee the predictable development of private law as the extent to which codifications act as a 'filter' or a 'brake' for arbitrary development of fragmented areas that are politically popular decreases.[1280]

While codifications form a framework for the predictable development of private law, the private law acquis does not know a similar barrier and develops as the European legislator considers this beneficial for the internal market. Although problems may not always arise in a logical, predictable manner, national actors could take a more active approach in indicating the need for a predictable development of the law.

vi) The interpretation of blanket clauses by the CJEU in this area may in turn affect the interpretation of national blanket clauses.

The interpretation of articles 307 BGB and 6:233 sub a BW, and the consistency of these articles with respectively articles 242 BGB and 6:2 and 6:248 BW may be affected. Directive 93/13 and other relevant Directives are developed by a legislator who is not necessarily aware of the *Richtigkeitsgewähr* or of the content of national default rules that may be relevant for determining

[1280] Comp. M. Lieb, 'Grundfragen einer Schuldrechtsreform', *AcP* 1983, p. 347.

whether clauses are unfair. Wolf[1281] has pointed out that judicial evaluation of STC's should also take into account the incompatibility of some clauses with European law, including relevant measures such as Brussels I. Simultaneously, the German judiciary remains obliged to interpret article 307 BGB in accordance with the GG, even if such is not in accordance with European law.

Moreover, the question which court is competent to interpret blanket clauses in the private law *acquis* is not clear. However, the CJEU generally is competent to interpret European law and it has decided on the allcation of competences. The division of competences depends on the aim of European measures, as well as the degree of harmonisation involved and the question whether it concerns a Directive or a Regulation.

If a revised Directive aims for maximum harmonisation, it is not unlikely that articles 307 BGB and 6:233 sub a BW would have to be interpreted in accordance with article 3 Directive 93/13, which may entail a change in the interpretation of these articles, and which may lead to inconsistencies between articles 307 and 242 BGB and articles 6:233 sub a and 6:248 BW.

It follows that the German and Dutch judiciary need to interact with the CJEU for the correct interpretation of Directive 93/13. This involves especially referring cases to the CJEU with regard to the interpretation of implemented law within the scope of the Directive. As the German and Dutch legislator have both chosen to expand the scope of the Directive in articles 305-310 BGB, the CJEU may assume competence for the interpretation of articles going beyond the scope of the Directive.[1282]

Also, the German and Dutch judiciary arguably need to interact with foreign judges interpreting Directive 93/13 to ensure the harmonised interpretation of the private law *acquis*, especially if Directives pursue maximum harmonisation. However, this may not necessarily be in the interest of private parties, who may have little insight in these decisions, while foreign decisions may also be influenced by divergent default law.

However, the reform of the Directive should be a reason to consider national experiences. The German use of article 242 and 307 BGB and the underlying doctrine of the *Richtigkeitsgewähr* may be interesting for the European legislator. If the courts take an active approach to the conform interpretation of implemented law, the relevance of studies that stubbornly cling to the national analysis of methods might decrease. This however does not seem to be the case – rather, the national analysis may at times provide support for an interpretation diverging from harmonised interpretation of implementation law.[1283]

vii) The European legislator needs the support of national state actors to pursue harmonisation.

If national legislators do not support European initiatives, pursuing harmonisation will be problematic. Moreover, generally, the European legislator depends on national actors for the enforcement of Directive 93/13, implemented in respectively articles 305-310 BGB and articles 6:231-247 BW. Moreover, in the review of Directive 93/13, national experiences should be taken into account.

2) The development of treaties and the development of cross-border trade entails that state actors should taken into account decisions and initiatives from foreign state actors.

What does that mean for the development of the law on STC's?

i) The needs of international commerce and regulatory competition may induce German and Dutch state actors to take note of foreign and transnational developments.

[1281] M. Wolf, 'Vertragsfreiheit und Vertragsrecht im Lichte des AGB-Rechtsprechung des BGH', in: FG 50 Jahre BGH, I, p. 123.
[1282] ECJ 17 July 1997 (Bernd Giloy v Hauptzollamt Frankfurt am Main-Ost), C-130/95, [1997] ERC, p. I-4291.
[1283] Comp. below par. 10.3.1.3.

Studying foreign laws and decisions, as well as soft laws – such as the PECL, the UNIDROIT Principles and the DCFR – in the drafting of legislations may enable the drafters of legislation to distill the 'best' rules. [1284]

Regulatory competition need not necessarily take place through the reform of the law on STC's, but also through the reform of the law on ADR as well as civil procedure law. National legislators however need to take into account existing harmonisation on the law on STC's in their attempts to establish a set of rules that will make it more attractive for foreign and international parties to settle their disputes under German or Dutch law.

Alternatively, regulatory competition may lead to a different approach to the interpretation of international contracts. Accordingly, in German law, it has been argued that instead of a 'national' interpretation, where default rules are used to fill gaps arising from the ineffectiveness of unfair STC's, especially international terms should be interpreted as objectively and international as possible.[1285] Wolf[1286] has even argued that an international standard should be established to evaluate the fairness of STC's used in international B2B contracts.

ii) Judges increasingly need to take into account foreign decisions.

As more contracts are concluded under international instruments, referring to foreign decisions may enhance predictability, if the relevance of foreign decisions is accepted.

For contracts concluded under the CISG, judges should look at foreign decisions to ensure that the CISG is interpreted and applied consistently throughout contracting states. Article 7 par. 1 CISG notes that it is to be interpreted uniformly. The consistent interpretation of the CISG also benefits predictability for private parties, especially if there are few decisions under the CISG in a particular contracting state. As a database provides parties with relevant decisions on the CISG, they may be better aware of relevant foreign decisions.

Also, if the number of cross-border cases increases, national judges may increasingly be confronted with the need to interpret STC's in accordance with applicable foreign law. Courts can become aware of foreign law through expert advice or through interaction with foreign courts.

3) The need for interaction between state and non-state actors may increase as non-state actors gain experience and expertise on complex cross-border contracts and STC's used in those contracts.

This may have the following consequences for the development of the law on STC's:

i) At the national level, the added value of alternative regulation has already been recognised.

In the German legal order, state actors and non-state actors have cooperated in the drafting of STC's for buidling contracts (*Verdingungsordnung für Bauleistungen*/B) that are partially exempted from judicial control in accordance with article 310 par. 1 BGB, if the VOB/B, the content of which may not have been altered by contract parties, are included in B2B contracts.[1287] In the Dutch legal order, state actors have encouraged the development of collectively negotiated STC's.

ii) The expertise and the extent to which alternative regulation reflects business practices may also be a reason to turn to sources of alternative regulation in the interpretation and evaluation of STC's.

[1284] R. Zimmerman, *The new German law of obligations, Historical and comparative perspectives*, OUP: Oxford 2005, p. 77.
[1285] Baumbach/Hopt/Handelsgesetzbuch/Hopt (2012) Incoterms introduction, nr 18. Ulmer/Brandner/Hensen/AGB-Recht/Schmidt (2011) annex to article 305, nr 32 finds that international STC's have to be interpreted in accordance with the views and practices in internaitonal trade, but rejects a principle of uniform interpretation of international STC's.
[1286] M. Wolf, 'Auslegung und Inhaltskontrolle von AGB im internationalen kaufmännischen Verkehr', *ZHR* 1989, p. 312-313.
[1287] MunchKomm zum BGB/Wurmnest (2012) article 307 nr 143. See critically on the VOB/B Ulmer/Brandner/Hensen/AGB-Recht/Christensen (2011) specific STC's, building contracts, nr 3.

In the interpretation of international contracts and international STC's, article 346 HGB provides that business practices should be taken into account. Accordingly, Blaurock[1288] notes that despite efforts to harmonise private laws, international STC's and model contracts, as well as customary law and business practices, continue to play a prominent role. Possibly, the rules established in these instruments may be more suitable for filling up gaps in the contract the use of default rules if gaps arise. Default rules may be less suitable in international cases and in cases where STC's are part of complex contracts or particular types of contracts that the legislator has not provided specific rules for. In these cases, the contractual provisions as well as the provisions from actors specialised in drafting STC's for international trade may be better suited to provide rules for cross-border contracts that are in accordance with the needs of legal practice.

iii) As businesses practices are increasingly cross-border and become more complex, more European and international law may develop.

If this is the case, the role of stakeholder organisations that provide their members with STC's suitable for complex cross-border contracts may increase, especially as these organisations may gain experience and build considerable expertise in drafting model contracts and STC's to the advantage of their members who may not have this expertise themselves.[1289]

International organisations may for example also collect information about diverging interpretation of STC's. Furthermore, especially if they have expertise of international trade that state actors lack, stakeholders may choose to provide information to state actors or to lobby for changes in legislation, or both.[1290]

Moreover, if courts have little experience in dealing with cross-border cases, or if parties parties may opt for ADR. If contract parties increasingly rely on arbitration, this may make it more difficult for the European legislator to determine which divergences between private laws can pose a barrier for cross-border trade. In this view, the focus on divergent positive laws can thus be doubted.

9.3.3. Conclusion on interdependence and the need for interaction

Various actors have participated in the development of the law on STC´s, and interdependence has arisen. Therefore, interaction is necessary between the following actors:

1) National and European state actors
2) State actors and non-state actors
3) State actors from different legal orders

As interdependence develops, more interaction, in the form of deliberation, becomes necessary, and eventually, actors have to adjust the use of techniques.

9.4. Conclusion and outlook

The interdependence between actors means that actors in the development of the law on STC's should take into account that other actors also develop private law, interact with these actors accordingly, and eventually adjust the use of techniques. If this is the case, this will benefit the extent to which techniques contribute to predictability, accessibility, consistency

[1288] U. Blaurock, 'Wirtschaft und Rechtsordnung', U. Blaurock, N. Goldschmidt, A. Hollerbach (eds.), *Das selbstgeschaffene Recht der Wirtschaft. Zum Gedenken an Hans Großmann-Doerth (1894-1944)*, Mohr Siebeck: Tübingen 2005, p. 70.
[1289] For example the STC's on auctions established by the Federal Association for German Art Auctioneers, ('*Bundesverband deutschen Kunstversteigerer*'), see further Ulmer/Brandner/Hensen/AGB-Recht/Schmidt (2011), specific STC's, Auctions.
[1290] For example, the Commercial Law and Practice Commission of the ICC claims to '[feed] business views into intergovernmental organizations as they shape policies that directly affect business operations', see http://www.iccwbo.org/about-icc/policy-commissions/commercial-law-and-practice/ (accessed on 11 July 2012).

and responsiveness. Conversely, if this is not the case, the extent to which techniques contribute to these benchmarks is limited.

Chapter 10 will ask whether the extent to which the German law on STC's meets benchmarks of predictability, consistency, accessibility and responsiveness can be traced to actors' recognition of other actors' initiatives and the interaction between these actors.

Chapter 11 will ask whether the extent to which the Dutch law on STC's meets benchmarks of predictability, consistency, accessibility and responsiveness can be traced to actors' recognition of other actors' initiatives and the interaction between these actors.

Chapter 12 will consider more general conclusions for the development of European private law through national techniques that can be deduced from the case studies.

Some limitations have been set to the case study. The case study will focus on the use of national techniques discussed in chapter 7 and the additional and alternative techniques considered in chapter 8. Also, the case study will not seek to provide a comprehensive overview of the abundantly available case law, but rather consider relatively recent decisions in order to determine whether the judiciaries take into account the development of law by other actors than the national legislator. The case studies will both look at decisions in which initiatives from other actors are clearly taken into account, as well as decisions where the initiatives from other actors seem to have been ignored.

Both the German and the Dutch case study will include the DCFR. However, the DCFR is not part of positive law that can currently be invoked before the courts. Therefore, the extent to which respectively German and Dutch law on STC's is comprehensible to private parties cannot be found by studying the relevant provisions in the DCFR. Despite its lack of binding force, the DCFR may play an important role in the development of the private law *acquis*, particularly in the development of a Common European Sales Law and, as a 'toolbox', possble, in the reform of the private law *acquis*. Accordingly, the DCFR will be studied as a technique in addition to the acquis and national laws. If actors, in the development of the DCFR, have adequately taken into account relevant initiatives from other actors, is it likely to contribute to the quality of the law on STC's? Notably, studying the rules of the DCFR on unfair contract terms may make clear whether the DCFR, as an additional set of rules, provides a clear additional value, a question considered in chapter 7.

Moreover, some differences between the German and Dutch legal order should be noted beforehand. In the German case study, BGH case law plays an important role, while the Dutch case study pays more attention to the decisions from lower courts and ADR decisions. The Dutch chapter considers lower courts' decisions more extensively, because less case law from the Hoge Raad has developed, unlike the German legal order, where an abundant amount of BGH case law is available. In contrast, the Dutch chapter also pays attention to decisions in ADR cases. A similar system of ADR has not yet been established in Germany and decisions in German ADR cases have moreover rarely been published. In addition, European developments that have been considered in chapter 10, in particular the development of the DCFR and general principles, will be considered in less detail in chapter 11, to prevent unneccessary repetition.

Chapter 10: The development of the law on *Allgemeine Geschäftsbedingungen*

10.1. Introduction.

This chapter will ask whether the extent to which the German law on STC's meets benchmarks of predictability, consistency, accessibility and responsiveness can be traced to actors' recognition of other actors' initiatives and the interaction between these actors.

Paragraph 10.2 will discuss the quality of the German law on STC's. Subsequently, paragraph 10.3 will consider the use of codifications, and paragraph 10.4. will turn the use of blanket clauses. Paragraph 10.5. will address the development of the law on general principles. Paragraph 10.6. will draw some conclusions and paragraph 10.7. will turn to the use of additional or alternative techniques. Paragraph 10.8. will end with a conclusion.

10.2. The law on *Allgemeine Geschäftsbedingungen*

The German legislator initially stipulated the law on STC's outside the BGB, through *Sonderprivatrecht*, in the *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* ('AGB-Gesetz', hereafter: 'AGBG'), established in 1976. The AGBG has been amended only slightly for the implementation of Directive 93/13, and it was incorporated in the BGB in the *Schuldrechtsreform*. The revision of the law on STC's was not considered during the *Schuldrechtsreform*, which took place under considerable time pressure that decreased the chances that the law on STC's would be critically reconsidered. The most controversial question seems to have been whether the AGBG should be incorporated in the BGB.[1291] Thus, the AGBG, and later articles 305-310 BGB, have provided a stable framework for the development of the law on STC's.

Although unpredictability and inconsistency may be difficult to avoid with the introduction of more judicial control through blanket clauses, the extent to which this was the case was limited as preceding case law already evaluated STC's.[1292] The introduction of the AGBG also served to establish a more consistent standard for evaluating clauses as inconsistencies in case law became apparent.[1293] Since its introduction, the BGH has provided clear guidelines on the assessment of the fairness of clauses[1294] that have made current article 307 BGB one of the most prominent blanket clauses in the BGB.[1295]

Thus, the room left to the judiciary under the AGBG and later articles 305 et seq BGB has not resulted in unpredictability or inconsistency.[1296] Ulmer[1297] finds that the AGB-Gesetz has contributed significantly to the quality of STC's and the transparency in trade.

[1291] Comp. Pfeiffer, *VuR* 2001, p. 95, 99 who criticises the haste of the process, which he explains by pointing to the need to make use of political support for the reform of law while it lasted, and questions whether rushing the incorporation of an important subject such as AGB's is convincing.

[1292] BGH 27 November 1974, VIII ZR 9/73, *NJW* 1975, 163.

[1293] H. Kötz, *Welche gesetzgeberischen Massnahmen empfehlen sich zum Schutze des Endverbrauchers gegenüber Allgemeine Geschäftsbedingungen und Formularverträgen: dargestellt an Beispielen aus dem Kaufs- und Werkvertrags- sowie dem Maklerrecht, Gutachten für den 50. Deutschen Juristentag*, Volume I, A, p. 52-53.

[1294] M. Wolf, 'Vertragsfreiheit und Vertragsrecht im Lichte der AGB-Rechtsprechung des BGH', in: C.-W. Canaris, A. Heldrich, (eds.), *50 Jahre Bundesgerichtshof. Festgabe aus der Wissenschaft, I*, Beck: München 2000, p. 113.

[1295] MunchKomm zum BGB/Basedow (2012), introduction to articles 305 et seq BGB, nr 15.

[1296] P. Ulmer, 'Zehn Jahre AGB-Gesetz – Rückblick und Ausblick', in: H. Heinrichs, W. Löwe, P. Ulmer (eds.), *Zehn Jahre AGB-Gesetz*, Kommunikationsforum Recht: Köln 1987, p. 5.

[1297] P. Ulmer, 'Zehn Jahre AGB-Gesetz – Rückblick und Ausblick', in: H. Heinrichs, W. Löwe, P. Ulmer (eds.), *Zehn Jahre AGB-Gesetz*, Kommunikationsforum Recht: Köln 1987, p.17-18.

However, the regime has also been subjected to cricitism,[1298] also visible in private initiatives for reform of the law. These initiatives do not concern the quality of the law in terms of predictability, consistency or accessibility. Instead, it is argued that the law hinders trade by subjecting clauses in business contracts to judicial evaluation[1299] and because of the strict requirements of clauses that are argued to be individually negotiated.[1300]

Thus, generally, the quality of the regime is considered high. Can this success be traced to the sufficient recognition of interdependence and corresponding interaction between relevant actors, or not?

10.3. The development of the law on STC's through the BGB

As the private law *acquis* develops, the extent to which the BGB can contribute to the predictability, accessibility, consistency and responsivenessof private law decreases. Therefore, interaction between German state actors and European state actors has become necessary. This paragraph asks whether German state actors have taken into account that the European legislator also develops private law, and have interacted with these actors accordingly, and how this has affected the predictability, consistency, accessibility and responsiveness of private law.

Paragraph 10.3.1. will consider the choice of the legislator between the development of the law on STC's through *Sonderprivatrecht* or through the BGB. Paragraph 10.3.2. will consider the implementation of Directive 93/13 by the German legislator and judiciary. Paragraph 10.3.3. will consider the German law on STC's and international trade and paragraph 10.3.4. will end with a concusion.

10.3.1. Codification or *Sonderprivatrecht*?

This paragraph will ask whether the German legislator, in the development of the law on STC's, have adequately taken into account that other actors also develop private law, which may inhibit the extent to which the BGB can contribute to benchmarks of predictability, accessibility, consistency and responsiveness. Has the German legislator adequately interacted with European actors and how this has affected the predictability, consistency, accessibility and responsiveness of the law on STC's?

Paragraph 10.3.1.1. will consider the initial choice for *Sonderprivatrecht*. Paragraph 10.3.1.2. will turn to the 1980s initatives for the reform of the law of obligations. Paragraph 10.3.1.3. will turn to the *Schuldrechtsmodernierung* and paragraph 10.3.1.4 will end with a conclusion.

10.3.1.1. A national choice for *Sonderprivatrecht*

Why did the German legislator initially opt for *Sonderprivatrecht* and did the German legislator sufficiently recognise interdependence between actors developing the law on STC's?

Importantly, when the AGBG was drafted, the role of the EU in the area was arguably much smaller than it is today. As competence had not yet been reallocated to the European

[1298] Comp. prominently Staudinger Komm zum BGB/Schlosser (2006), Introduction to articles 305 et seq, nr 24, also K.P. Berger, 'Abschied von Privatautonomie im unternehmerischen Geschäftsverkehr?', *ZIP* 2006, p. 2149.
[1299] See further below par. 10.3.3.1.2.
[1300] See for example E. Gottschalck, 'Neues zur Abgrenzung zwischen AGB und Individualabrede', *NJW* 2005, p. 2493. See on both points of criticism convincingly F. Graf von Westphalen, '30 Jahre AGB-Recht – Eine Erfolgsbilanz', *ZIP* 2007, p. 149.

level, or to a much smaller extent, there was less interdependence between actors, and thus, less need to develop a strategy to deal with the ongoing development of private law at a European level. However, generally, the added value of comparative research in the drafting of legislation had been recognised. Also, the use of codifications in a pluralistic modern industrial society had been criticised, as reaching consensus became more difficult while the legislator also needed to deal with social and economical issues, frequently through *Sonderprivatrecht*.[1301] In the 1970s, the EU had published an outline for a Directive on unfair terms, in accordance with its pursuit to establish a consumer protection policy.[1302] This development did however not inhibit Germany to develop the laws in this area.[1303] What were the reasons to develop the law on STC's outside the BGB?

1) As the AGBG pursued a 'social' aim, it did not belong in the BGB that took private autonomy and freedom of contract as a starting point.[1304]

The drafting of the AGBG should be seen against the background of the 1971 statement of the *Bundesregierung* on establishing a consumer policy.[1305] Accordingly, the first draft of the working group on the AGBG emphasised that the freedom of contract, which in normal cases effected a balance of contract parties' rights and duties, was in reality used to the advantage of one contract party with a better bargaining position who drafted STC's.[1306] In particular, the proposal emphasised that a retreat of the legislator from the law on STC's, also characterised as the self-created law of trade ('*selbstgeschaffenes Recht der Wirtschaft*') was irreconcilable with the the constitutional task of the legislator to establish a social state, and the proposal accordingly sought to establish a 'social' contract law.[1307] This emphasis was not in accordance with the general principles of contractual freedom of the BGB. Accordingly, article 24 AGBG stipulated that although some of its provisions were not applicable in cases where STC's were used against businesses or legal persons under public law, some provisions – including the blanket clause in article 9 AGBG – were applicable.

In its advice before Parliament, the committee argued that the AGBG is necessary to protect consumers from the one-sided drafting of STC's by sellers, to their detriment. Although the scope of the AGBG is not limited to business to consumer contracts, the committee notes that in the long term, protection of businesses is to the benefit of consumers as well, as the extra costs caused by unfair STC's are likely at least partially passed on to consumers.[1308] This raises the question whether other consumer protection laws should not also be extended to contracts between businesses.

The choice for *Sonderprivatrecht* because of the social character of the AGBG may be criticised on the following grounds:

i) The AGBG did not exclusively aim to increase consumer protection, but was extended to protect businesses subjected to STC's as well. Should the AGBG therefore not have been incorporated in the BGB?[1309]

[1301] J. Esser,'Gesetzesrationalität im Kodifikationszeitalter und heute', in: H.-J. Vogel, J. Esser*, Recht und Staat im Geschichte und Gegenwart, 100 Jahre oberste deutsche Justizbehörde*, Morh Siebeck: Tübingen 1977, p. 13 et seq, comp. also F. Wieacker, 'Aufstieg, Blüte und Krisis der Kodifikationsidee', in: *Festschrift für Gustav Boehmer*, Roerscheid: Bonn 1954, p. 48-49.
[1302] Comp. the Preliminary programm of the European Economic Community for a consumer protection and information policy, OJ C 92/2, 25.4.1975.
[1303] See for a comparative overview HKK/Hofer (200?), articles 305-310, nr 30.
[1304] Comp. N. Reich, 'Zivilrechtstheorie, Sozialwissenschaften und Verbraucherschutz', *ZRP* 1974, p. 187.
[1305] Arbeitsgruppe zur Verbesserung des Verbraucherschutzes gegenüber Allgemeine Geschäftsbedinungen, *Vorschläge zur Verbesserung des Schutzes der Verbraucher gegenüber Allgemeine Geschäftsbedinungen, Erster Teilbericht*, Referat für Presse und Öffentlichkeit: Bonn 1974, p. 18-20.
[1306] Erster Teilbericht, p. 13.
[1307] Erster Teilbericht, p. 35.
[1308] Bericht des Rechtsausschusses, 23 June 1976, Drucksache 7/5422, p.1, 4, available at http://dipbt.bundestag.de/dip21/btd/07/054/0705422.pdf.
[1309] U. Preis, 'Persönlicher Anwendungsbereich der Sonderprivatrechte', *ZHR* 1994, p. 603.

ii) The BGB is, as such, not completely unfamiliar with the protection of a contract party who is in a less advantageous bargaining position than its contract party. Despite the focus of the BGB on private autonomy, the BGB did, before the incorporation of the AGBG, already provide for compensation of unequal bargaining positions.[1310]

Notwithstanding these objections, the distinction between 'general' private law and *Sonderprivatrecht* is still defended, even after the inclusion of the AGBG into the BGB.[1311]

2) The initial choice to develop rules outside the BGB was in accordance with the choice to develop *Sonderprivatrecht* outside of the BGB to safeguard the stable development of the BGB as well as the flexibility of laws outside the BGB. Accordingly, the committe recognised the possibility that the AGBG would need to be amended.[1312]

3) The inclusion of provisions on civil procedure law also indicated the development of *Sonderprivatrecht* in the AGBG.

4) Also, if the AGBGwould have been incorporated in the BGB, this would have been part of a more general reform of the law of obligations, which would probably have postponed the introduction of the AGBG. The drafting of the AGBG did give rise to arguments for reform.

These arguments for *Sonderprivatrecht* are not based on foreign experiences or European initiatives.[1313] Although the first draft pointed to comparative research on the judicial evaluation of STC's,[1314] the draft proposal focussed on a national level and did not mention the debate that had also started at a European level, and it does not evaluate foreign solutions. Consequently, the choice to establish separate legislation cannot really be seen as an argument against the incorporation of the private law *acquis* into the BGB.

However, the reasons to develop *Sonderprivatrecht* rather than incorporate the acquis into the BGB should be considered in the implementation of the *acquis*. Are these arguments still considered or are there reasons for the German legislator to change its approach as *Sonderprivatrecht*, both at the national and the European level, continues to develop?

10.3.1.2. Comparative law and the continued existence of *Sonderprivatrecht*

The development of *Sonderprivatrecht* alongside the BGB, especially the AGBG, gave rise to the question whether this was a desirable development, whether these subjects should really be stipulated outside the BGB, or whether the BGB should be reformed.[1315] Consequently, only a few years after the AGBG was established, initiatives to reform the BGB were

[1310] Comp. M. Lieb, 'Sonderprivatrecht für Ungleichgewichtslagen?', *AcP* 1978, p. 197 who has argued that the AGBG only partially codified the law on the judicial evaluation of contracts on the basis of article 242 BGB, which went beyond the evaluation of STC's.
[1311] J. Stürner, 'Der hundertste Geburtstag des BGB – nationale Kodifikation im Greisenalter?', *JZ* 1996, p. 742.
[1312] Bericht des Rechtsausschusses 1976, p. 1, 4 .
[1313] See critically W. Tilman, 'Das AGB-Gesetz und die Einheit des Privatrechts', *ZHR* 1978, p. 54, who argues that in the drafting of the AGBG, too little attention was paid to alternative possibilities, in particular the alternative to include the AGBG in the BGB.
[1314] See for an overview H.E. Brandner, 'Wege und Zielvorstellungen auf dem Gebiet der Allgemeinen Geschäftbedingungen', *JZ* 1973, p. 613.
[1315] See further A. Wolf, ´Die Ueberarbeitung des Schuldrechts´, *AcP* 1982, p. 80 et seq.

developed. The government, preceding legislative activities, organised the drafting of preliminary reports ('*Vorschläge und Gutachten*').'[1316]

A separate report on comparative law should enable the German legislator to benefit from experiences in other legal orders on the inclusion of separate laws into a codification.[1317]

This preliminary report on comparative law[1318] concluded that in prominent legal orders – especially with similar codifications, in Switzerland and The Netherlands – the development of separate legislation alongside codifications had been regarded with suspicion, while other legal orders – especially France – had chosen for separate legislation. The reasoning for incorporation or *Sonderprivatrecht* differed. While Italy and The Netherlands, at the time, had both already chosen to incorporate the law on STC's into the codification, this was more difficult for legal orders with older codifications such as France, that had chosen for separate legislation. Austria opted for a middle road by establishing a separate law for consumer protection ('*Konsumentenschutzgesetz*'), which was however criticised as having little relevance for German law. The comparative law report payed limited attention to Member States – such as the United Kingdom and Sweden – that used techniques that differed too much from German experiences.[1319] Thus, the experience in these legal orders with the coexistence of separate laws without a codification was not an object of inspiration, even though the experience with the development of particular legislation was a reason to include these states in the comparative law report.[1320]

However, the report merely lists the strategies adopted in other legal orders without specifically arguing for a course of action. The other reports were also not unequivocal. Interestingly, Westermann,[1321] noted that the *Konsumentenschutzgesetz* could serve as a source of inspiration for the legal order as it provided an alternative between *Sonderprivatrecht* and incorporation. However, he considered the development of a separate code for consumer contracts unattractive as it could give rise to demarcation difficulties.

The assignment to the commission on the reform of the law of obligations aimed at revising parts of the law of obligations and prescription that were in need of reform,[1322] especially against the background of initiatives for harmonisation in this area and comparative research.[1323] Even though the development of consumer protection legislation alongside the BGB prompted the legislator to consider revision,[1324] and the inclusion of *Sondergesetze* into the BGB had been subject to debate,[1325] the revision aimed to incorporate the experiences of legal practice since the establishment of the BGB, thereby maintaining the methodology and the principles underlying the BGB. Drafts for Directives in the area of revision were not a reason to postpone the revision.[1326]

[1316] Bundesminister der Justiz, 'Einleitung', in: Bundesminister der Justiz (ed.), *Vorschläge und Gutachten zur Überarbeitung des Schuldrecht*, Vol. I, Bundesanzeiger: Köln 1981, p. XI.
[1317] Bundesminister der Justiz, in: *Vorschläge und Gutachten zur Ueberarbeitung des Schuldrecht*, Vol. I, p. XI. H.-G. Landfernmann, 'Überarbeitung des deutschen Schuldrechts', *RabelsZ* 1981, p. 127 also notes that comparative law may give insight in the strategies adopted by other states in the development of private law within or outside the civil code.
[1318] Max Planck Institut für ausländisches und internationales Privatrecht, 'Rechtsvergleichung', in: Bundesminister der Justiz (ed.), *Vorschläge und Gutachten zur Überarbeitung des Schuldrecht*, Vol. I, Bundesanzeiger: Köln 1981, p. 67-68.
[1319] Max Planck Institut für ausländisches und internationales Privatrecht 1981, p. 68.
[1320] Max Planck Institut für ausländisches und internationales Privatrecht 1981, p. 9.
[1321] H.P. Westermann, 'Verbraucherschutz', in: Bundesminister der Justiz (ed.), *Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*, Vol. III, Bundesanzeiger: Köln 1983, p. 74 et seq.
[1322] H.A. Engelhard, 'Zu den Aufgaben einer Kommission für die Überarbeitung des Schuldrechts', *NJW* 1984, p. 1201.
[1323] R. Stürner, 'Empfiehlt sich die von der Schuldrechtskommission vorgeschlagene Neuregelung des allgemeinen Leistungsstörungsrechts, der Mängelhaftung bei Kauf– und Werkvertrag und des Rechts der Verjährung? - Versuch einer Themenpräsentation', *NJW*-Beil 1994, p. 2.
[1324] A. Wolf, ''Überarbeitung des Schuldrechts'', *AcP* 1982, p. 80.
[1325] Comp. the discussion sketched in R. Damm, 'Verbraucherrechtliche Sondergesetzgebung und Privatrechtssystem', *JZ* 1978, p. 175-176.
[1326] A. Wolf, ´Die Ueberarbeitung des Schuldrechts´, *AcP* 1982, p. 87.

According to Ulmer[1327] incorporating the AGBG into the BGB was not subject to debate, while it was also not in need of revision. Dörner[1328] notes that the development of *Sonderprivatrecht* avoided amendments of the BGB. Consequently, the 1992 proposal for the *Schuldrechtsreform* aimed to preserve the AGBG, and limit the amendments to this law to amendments that had become necessary by the *Schuldrechtsreform*.[1329] However, after the 1994 *Deutscher Juristentag*, despite a positive reception, the draft designed by the committee to revise the BGB did not result in the reform of the BGB until 2000, when the draft for the *Schuldrechtmodernisierungsgesetz* was published.[1330]

It may be concluded that the incorporation of the AGBG was not a subject of thorough discussion, during the drafting of both the AGBG and the 1981 initative for a *Schuldrechtsreform*, despite comparative research on this point and the comparative preliminary report. The choice to maintain the development of *Sonderprivatrecht* was not based on foreign experiences. The German legislator also did not anticipate the ongoing development of the private law *acquis* and did not reconsider its reasoning for codification or postpone the revision of the law of obligations in the light of draft Directives.

10.3.1.3. The *Schuldrechtsreform* and the choice for incorporation

Whereas interdependence had hardly developed during the drafting of the AGBG and the 1981 and 1983 preliminary reports, at the time of the *Schuldrechtsmodernisierung*, interdependence had developed as a considerable part of the private law *acquis* had developed. The development of the Directive on consumer sales prompted the German legislator to reform the law of obligations and in contrast to the 1992 draft, the discussion draft in 2000 incorporated large parts of the AGBG in the BGB, which however did not entail drastic changes to the AGBG as such.[1331] Did the German legislator recognise that these developments could inhibit the extent to which the BGB may ensure the predictability, accessibility and consistency of law?

In the discussion draft, various reasons for incorporation of the AGBG into the BGB are considered:

1) The codification principle, according to which private law should be contained within a uniform, theoretically and dogmatically sound code that shows no gaps. In turn, this furthers the accessibility [1332] and coherence[1333] of private law.[1334] As the law on STC's concerns a central area of contract law, the development of *Sonderprivatrecht* would

[1327] P. Ulmer, 'Zehn Jahre AGB-Gesetz – Rückblick und Ausblick', in: H. Heinrichts, W. Löwe, P. Ulmer (eds.), *Zehn Jahre AGB-Gesetz*, Verlag Kommunikationsform: Köln 1987, p. 6, 16.
[1328] H. Dörner, 'Die Integration des Verbraucherrechts in das BGB', in: R. Schulze, H. Schulte-Nölke (eds.), *Die Schuldrechtsreform vor dem Hintergruind des Gemeinschaftsrechts*, Mohr Siebeck: Tübingen 2001, p. 178.
[1329] Abschlussbericht der Kommission zur Ueberarbeitung des Schuldrechts, 1992, p. 278 et seq. Comp. however critically W. Ernst, 'Zum Kommissionsentwurf für eine Schuldrechtsreform', *NJW* 1994, p. 2179 who finds that the draft does not sufficiently take into account consumer protection law, including the AGBG.
[1330] See further R. Zimmerman, 'Schuldrechtsreform?', in W. Ernst, R. Zimmerman (eds.), *Zivilrechtswissenschaft und Schuldrechtsreform*, Mohr Siebeck: Tübingen 2001, p. 15-16.
[1331] However, some changes in the evaluaiton of STC's may be visible. These changes may be attributed to the more general reform of the law of obligations and prescription, as this may affect the fairness of STC's as default law is taken as a starting point to assess the fairness of therse terms under article 306 BGB.
[1332] See especially J. Schmidt-Räntsch, 'Reintegration der Verbraucherschutzgesetze durch den Entwurf eines Schuldrechtsmodernisierungsgesetzes', in: R. Schulze, H. Schulte-Nölke (eds.), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts*, 2001, p. 169
[1333] See for example Pfeiffer & Schinkels 2001, p. 140.
[1334] BGB-Diskussionentwurf, available at http://www.dnoti.de/DOC/2001/eschurmo.pdf, p. 164.

moreover undermine the central role of the BGB, while incorporation helps to ensure the central role of the BGB.[1335]

2) The close relation between the BGB and the law on STC's.

Notably, the incorporation of the AGBG in the BGB therefore also beneficts consistency. Graf von Westphalen[1336] points to the clearer relation between articles 305-310 and more general contract law provisions in the BGB. Laws less intertwined with the BGB, in particular the law on product liability, remained outside the BGB.[1337] Importantly, this reasoning does not imply incorporation of all *Sonderprivatrechte* into the BGB.[1338] Insofar as separate laws have developed that should not be considered a part of 'general' private law, the development of private law alongside the codification would in this view still be possible – and desirable.

This reasoning can be contrasted with the restoration the codification principle – or at least, this reasoning raises the question what the codification principle entails.

This reasoning implies a change from the previous approach of the German legislator, because the close relation between the AGBG and the BGB was previously not considered a reason for integration.[1339] The AGBG was already considered closely intertwined with the BGB. Not only had the AGBG developed on the basis of article 242 BGB, it took default law in the BGB as a starting point to decide which contractual provisions could be considered fair, and requirements for the inclusion of STC's were in accordance with principles underlying contractual rules for the conclusion of contacts.[1340] Before the AGBG was included in the BGB, the close relation between the BGB and the AGBG was clearly indicated, and problems of inconsistency do not seem to have arisen. Arguably, this lack of problems may draw into doubt the necessity of inclusion.[1341] Why, therefore, is the close relation later an important argument for incorporation?

3) The predictable development was less convincing as a reason against incorporation.

In 2000, the AGBG had proven itself stable enough that incorporation would not subsequently render the BGB vulnerable to regular amendments, which would undermine the predictable development of the law on STC's.

► Did the German legislator adequately recognise interdependence in its reasoning?

Various instances of interdependence have been overlooked:

i) Developing a coherent system is not as feasible as originally envisaged, because private law is also developed by the European legislator, who pursues aims that may well differ from the aims pursued by the German legislator.

ii) The extent to which the German legislator is able to maintain a dogmatically sound system may diminish as the private law *acquis* develops.

Articles 305-310 BGB have been criticised for this reason. If the system established by the BGB was followed, articles 305-310 BGB should have been implemented in the general part of the BGB.[1342] Pfeiffer and Schinkel[1343] moreover argue that implementing the AGBG in the general part of the BGB

[1335] Schmidt-Räntsch 2001, p. 171.
[1336] F. Graf von Westphalen, 'AGB-Recht ins BGB - Eine erste "Bestandsaufnahme"', *NJW* 2002, p. 18-19, who also states that this change will increase the relevance of case law.
[1337] Critically A. Staudinger, 'Zur Novellierung des Produkthaftungsgesetzes', *NJW* 2001, p. 275.
[1338] M. Lieb, 'Grundfragen einer Schuldrechtsreform', *AcP* 1983, p. 331 rightly notes that this principle does not require gathering as many subjects as possible in one codification; rather, if a subject shows close interrelation with the subjects arranged in the BGB, this is a reason for inclusion Interestingly, however, Lieb also notes that the historical development of for example a subject in the HGB may also be an argument against inclusion.
[1339] P. Ulmer, 'Das AGB-Gesetz: Ein eigenständiges Kodifikationswerk', *JZ* 2001, p. 492.
[1340] Th. Pfeiffer, B. Schinkels 2001, p. 139.
[1341] Th. Pfeiffer, in: *Zivilrechtswissenschaft und Schuldrechtsreform*, p. 501, also Lieb 1983, p. 331.
[1342] Interestingly, this approach would be in accordance with the solution in the PECL and the UNIDROIT principles.
[1343] Pfeiffer & Schinkels 2001, p. 146.

would facilitate the protective aim of these provisions, in accordance with Directive 93/13. Notably, placing the provisions on STC's within the law of obligations may imply that outside the law of obligations, in binding one-sided juridical acts or juridical acts stipulated outside the BGB, is not applicable. Article 310 par. 4 BGB, which provides that for employment contracts, specific characteristics of employment law should be taken into account, Artiicle 310 par. 4 BGB exempts contracts under company law, and contracts in the area of family law and succession. This provision has similarly been criticised, as these exceptions are not in accordance with the system of the BGB.[1344]

Yet implementation that follows the system established by the BGB means scattering the provisions implementing the Directive over the BGB: provisions on the fairness of contract terms would be implemented near article 242 BGB, provisions on ineffectiveness would be implemented near article 138 BGB, and provisions on the contra legem interpretation and the requirement of transparency would be situated in yet another place in the BGB. This strategy would result in multiple European islands within the codification, and would not meet requirements of clarity on the implementation of Directives that confer rights on consumers; it is not likely that such implementation would make consumers sufficiently aware of their rights.

However, the approach to implement Directives in a group of provisions, rather than in separate provisions, may in turn be undermined as Directives also affecting the law on STC's develop. Thus, the proposal for the implementation of Directive 2011/7[1345] makes clear that article 7 is not implemented in articles 305-310 BGB.

iii) The German legislator is less able to independently maintain the central role of the BGB, as this also depends on the development of the private law *acquis* and the case law of the CJEU.[1346]

Particularly, the development of Regulations and the development of Directives that should be implemented as *Sonderprivatrecht* may undermine the central role of the BGB.

iv) Despite the emphasis on the codifciation principle and the distinction between general private law and *Sonderprivatrecht*, the question whether Directives are *Sonderprivatrecht* has not been debated, nor have the reasons to keep *Sonderprivatrecht* out of the BGB expressly been considered in the implementation of the *acquis*. It follows that the distinction therefore does not currently provide a sound basis for a predictable approach to the implementation of the private law *acquis*.

v) Arguably, in its reasoning under (2), the German legislator has overlooked that there is no close relation between the provisions in Directives and general private law. Instead, Directives typically seek to advance the internal market.

vi) The reasoning in (3) overlooks that articles 305-310 BGB also implement Directive 93/13, and the question whether the predictable development of the BGB is sufficiently guaranteed also depends on the further development of the *acquis*, in particular the future reform of this Directive, and the interpretation of the Directive by the CJEU.

[1344] See critically Grabitz/Hilf/Das Recht der Europäische Union/Pfeiffer (2009), article 1 nr 17-19.
[1345] BT-Drucks. 17/10491.
[1346] Th. Pfeiffer, 'Die Integration von "Nebengesetzen"in das BGB', in: W. Ernst. R. Zimmerman (eds.), *Zivilrechtswissenschaft und Schuldrechtsreform*, Mohr Siebeck: Tübingen 2001, p. 485-486.

►Thus, the arguments for incorporation in the *Schuldrechtsreform* have overlooked that as the private law *acquis* develops, the capability of the BGB to contribute to the accessibility, consistency and responsiveness of private law becomes subject to more limitations.

Arguably, reasons for developing *Sonderprivatrecht* offer an interesting starting point for discussions on the implementation of the *acquis* that may provide a starting point for a more predictable and consistent implementation of the *acquis*. However, predictability and consistency also depend on the extent to which the *acquis* develops predictablly and consistently.

10.3.1.4. Conclusion on the choice for codification

The German legislator did not consider the role of European actors in safeguarding the development of the law on STC's in a predictable, consistent, accessible and responsive manner. It follows that interaction between German, European and foreign actors, insofar present, has not served to adjust the use of codification. Perhaps, the careful drafting process of the AGBG and its success have contributed to this oversight.

However, it does not become apparent that this lack of attention for interdependence German legislator also undermines the predictability, consistency, and the accessibility of private law. To the contrary, the AGBG, and later articles 305-310 BGB have been considered as a success story. The law on STC's as such is not in need of revision.

However, as the private law *acquis* continues to develop, the extent to which the BGB contributes to predictability, accessibility and consistency diminishes further. Regrettably, also, a more general strategy for coping with the ongoing development on the law of STC's by the European legislator and in different areas of law has not been generally considered, despite interesting starting points in the distinction between general private law and *Sonderprivatrecht*.

10.3.2. The existence of well-developed legislation and harmonisation

The approach of German actors towards harmonisation is twofold: in the drafting of Directive 93/13, German actors have actively interacted with European actors, which has benefitted the consistent and predictable development of the law. In contrast, in the implementation of the Directive, German actors have not adequately interacted with European actors. In the short term this may benefit predictability, consistency and responsiveness, but the lack of interaction may inhibit the predictable, consistent and responsive development of the *acquis* in the long term.

Paragraph 10.3.2.1. will consider the development of the Directive 93/13 and paragraph 10.3.2.2. will turn to the subsequent approach of the legislator to the implementation of this Directive. Paragraph 10.3.2.3. will turn to the application of the Directive by the courts and paragraph 10.3.2.4. will discuss the attempted reform of the Directive. Paragraph 10.3.2.5. will end with a conclusion.

10.3.2.1. The debate in the development of the Directive

The drafting of Directive 93/13 was preceded by extensive comparative research as well as the 1975 resolution from the European Council[1347] and the European Parliament issued a

[1347] OJ No C 92, 25.4.1975.

consultation in 1984.[1348] Eventually, this led to the 1990 proposal for a Directive on unfair terms in consumer contracts.[1349] The proposal was accompanied by a 'competiveness and employment statement', in the Annex. The Annex makes clear that objections to the harmonisation of the law were not decisive and the European legislator was optimistic about the effects of the draft Directive.[1350]

The consultation in the German legal order was held after Directive 93/13 had been established, but this did not prevent German experts to take a position on the 1990 draft for a Directive,[1351] nor did it stop the federal government from rejecting the 1990 draft. The decision of the *Bundesrat*[1352] mainly seems to take German law, as well as the position of German businesses, as a starting point, especially arguing for a European regime that is more in accordance with the German law. German academia did not pay much attention to the European initiative, especially not compared to the drafting of the AGBG.

German law was one of the first and one of the best developed laws on STC's in the Union, and the European legislator therefore took note of German insights. The 1990 draft for a Directive was amended, largely in accordance with German criticism. Thus, the late consultation on Directive 93/13 may not have contributed to the debate at the European level, but it did not hinder the German legislator and German experts from participating in the European discussion. However, the comments on the draft Directive were hardly based on comparative research, which was available in abundance.[1353]

Thus, debate preceding the drafting of the Directive was limited, it but did not limit the discussion to such an extent that the German legislator and academics did not contribute to the discussion in the drafting process on the Directive, which benefitted the stable and consistent development of the German law on STC's, which in turn is beneficial for legal practice.

10.3.2.2. The implementation of the Directive

After the Directive had been established, two models for implementation were considered: on the one hand, amendments of the AGBG, and on the other hand, new legislation alongside the AGBG and the BGB. The expert draft ('*Referententwurf*')[1354] did not refer to comparative law, and assumed that the Directive already largely resembled the AGBG, arguing that the law should be amended as little as possible. This draft was subsequently criticised on various points. The draft implementation law ('*Regierungsentwurf*') partially took into account the criticism on the expert draft.

Accordingly, the definition of STC's as terms that are drafted for multiple contracts in the BGB has been adapted to the definition in the Directive which does not require multiple contracts, under article 310 par. 3 sub 2 BGB which stipulates that terms in contracts with consumers will also be considered STC's if they have been drafted for one contract.

[1348] Supplement 1/84, Bulletin of the European Communities..
[1349] COM (90) 322 final.
[1350] Comp. the answer to the question 'Have both sides of industry been consulted?': 'Yes their initial reaction was antagonistic. However, they do not perceive the true significance for them of the proposal. It will not harm their interests; just as the extensive legislation which already exists in 9 of the 12 Member States has not proved prejudicial to small- and medium sized businesses.'
[1351] Among others, see especially the criticism of Brandner & Ulmer BB 1991, p. 701.
[1352] Decision of the Bundesrat 1 March 1991, BR-Drucks. 611/90 , as well as the recommendation of the committees of 1 March 1991, BR-Drucks. 611/90.
[1353] See the overview from H.E. Brandner, 'Wege und Zielvorstellungen auf dem Gebiet der Allgemeinen Geschäftbedingungen', *JZ* 1973, p. 613 and the preliminary report on comparative law discussed in par. 10.3.1.2.
[1354] Referententwurf, *BB* 1995, p. 110.

Also, after the Directive had been established, attention was paid to the duties of Member States to implement the Directive. For example, Heinrichs[1355] extensively discusses the duties to implement the Directive under European law and argues that parts of the Directive can be implemented through the interpretation of national law in accordance with the Directive, an argument that has later been superseded by the CJEU decision in Commission/The Netherlands.

However, other, more critical comments, were not followed. In particular, the criticism from Schmidt-Salzer,[1356] is convincing in the light of later BGH case law on the Directive.[1357] Schmidt-Salzer pointed out that the approach to maintain the AGBG as much as possible, increased the risk that the underlying changes would be insufficiently clear. Schmidt-Salzer[1358] also pointed out that from the view of foreign observers, differences between the AGBG and the Directive are apparent, making the assumption that the AGBG and the Directive are already largely in conformity less convincing towards other Member States and the EU. The insights of foreign actors could therefore have prompted a more critical approach to the AGBG and led to a more critical evaluation whether the AGBG was in accordance with Directive 93/13.

Possible differences include article 9 AGBG, currently article 307 BGB, which stipulates that STC's can also be unfair if it is not clearly worded, while article 5 Directive merely stipulates that STC's in writing must be drafted plainly, and ambiguous terms will be interpreted contra preferentem. In addition, the Directive does not provide a specific rule on surprising clauses similar to article 305c par. 1 BGB. Basedow[1359] notes that the BGB is more precise than the Directive. In particular, the question arises whether the further indication in article 307 par. 2 BGB in which cases a term can be unfair, is in conformity with the autonomous interpretation established by the Directive, especially article 4 Directive that the unfairness of a term shall be assessed taking into account the nature of the goods or services on which parties contracted, and by referring at all relevant circumstances at the time of conclusion of the contract as well as the other terms of the contract.[1360] Article 307 par. 2 BGB might become especially problematic if the CJEU chooses to determine whether clauses are unfair by noting, for example, whether they diverge from the default rules in the DCFR, which may well contradict the referral to national default law.[1361] There is however no indication that the CJEU will adopt such an approach. Arguably, the divergences between article 307 par. 2 BGB and article 4 Directive is not problematic as the Directive aims for minimum harmonisation. Accordingly, despite the divergence in the wording of the Directive and the AGBG – and currently article 307 BGB – the legislator assumed that the BGB was in accordance with the Directive and would be interpreted in conformity with the Directive.[1362] Furthermore, it has been argued that the Directive may be indirectly applied for contracts between public bodies and consumers, as article 1 Directive speaks of contracts between suppliers and sellers and consumers, which, under article 2 par. 3 Directive are defined as either publicly or

[1355] H. Heinrichs, 'Umsetzung der EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen durch Auslegung Erweiterung des Anwendungsbereichs der Inhaltskontrolle', *NJW*1995, p. 153
[1356] J. Schmidt-Salzer, 'Transformation der EG-Richtlinie über miβbräuchliche Klauseln in Verbraucherverträgen in deutsches Recht und AGB-Gesetz', *BB* 1995, p.735.
[1357] See further below par. 10.3.2.3. and 10.4.1.2. Schmidt-Salzer, *BB* 1995, p. 736-737 moreover notes that the interpretation of STC's also differed from the interpretation foreseen in the Directive.
[1358] Schmidt-Salzer, *BB* 1995, p. 739.
[1359] MunchKomm zum BGB/Basedow (2012), introduction to articles 305-310, nr 24.
[1360] Somewhat confusingly, Grabitz/Hilf/Das Recht der Europäische Union/Pfeiffer (2009), article 4 nr 2 notes that article 4 par. 1 is not intended as a realisation of article 3 but rather as noting which objects are subject to interpretation. J. Schmidt-Salzer, 'Transformation der EG-Richtlinie über miβbräuchliche Klauseln in Verbraucherverträgen in deutsches Recht und AGB-Gesetz', *BB* 1995, p. 734 notes that referral to all circumstances during the time of contracting differed radically from case law and literature on the judicial evaluation and the interpretation of AGB's on the objective ('generallen') control and interpretation.
[1361] See further E.M. Kieninger, 'Vollharmonisierung des Rechts der AGB', *RabelsZ* 2009, p. 793
[1362] MunchKomm zum BGB/Basedow (2012), article 307, nr 4.

privately owned.[1363] However, these contracts may be determined by mandatory law that leaves no room for evaluation of STC's under articles 305 et seq BGB.[1364]

The German legislator might not have benefitted from implementation practices of foreign legislators. Little information seems to have been available on the implementation practices in other Member States that were also slow in implementing the Directive. However, even if the German legislator had taken into account the approaches of foreign legislators, it does not necessarily follow that this would have prompted a more active approach to the implementation of the Directive. Various Member States adopted restraint in the implementation of the Directive[1365] – and if the German legislator had for example been inspired by the approach of the Dutch legislator, this might have resulted in even more restraint towards the amendment of the AGBG.

In the implementation of Directive 93/13, the German legislator, in accordance with the general restraint exercised in the amendment of private law, did not affect drastic changes to the successful AGBG.[1366] German law was considered to be already in conformity with Directive, making drastic changes unnecessary, while establishing a separate law alongside the BGB and the AGBG would be undesirable because of potential problems with consistency and predictability.[1367] Moreover, this approach was also in the interest of a stable development of the law, which is also beneficial for legal practice.

Despite this restraint and the apparent similarity between the Directive and the BGB, the implementation of the Directive into German law was late.[1368] Moreover, the decision in Commission/The Netherlands[1369] indicated that the assumption that the BGB was already in accordance with the Directive was incorrect with regard to the *contra preferentem* interpretation of clauses. This decision demonstrates that it is not without risk to assume that current law already meets the requirements set out by the Directive. However, the view of the German legislator was based on previous CJEU case law that emphasised the discretion of national legislators in the implementation of Directives.[1370] More interaction with the CJEU would likely not have made national actors aware of further-going obligations.

Thus, foreign observations on compliance with the Directive would have been welcome, especially in the light of Commission/Netherlands. However, more interaction with foreign legislators to gain insight on foreign implementation strategies would not have been useful, and more interaction with European actors would also not necessarily have added useful insights, unless such interaction would have revealed further-going duties of implementation.

[1363] MunchKomm zum BGB/Basedow (2012) introduction to articles 305-310 BGB, nr 26, similarly Grabitz/Hilf/Das Recht der Europäische Union/Pfeiffer (2009), article 2 Directive 93/13, nr 23.
[1364] See for example Hessisches LSG 9 June 2011, *BeckRS* 2011, 76272, with references to further case law, on contracts with health care insurers that fall under the SGB.
[1365] COM (2000) 248 final.
[1366] P. Ulmer, 'Der AGB-Gesetz nach der Umsetzung der EG-Richtlinie über miβbräuchliche Klauseln in Verbraucherverträgen', in: Karlsruher Reform 1998, p. 9. According to Baier 2004, p. 49, the Directive was also influenced by the AGBG, which may have contributed to this assumption.
[1367] Baier 2004, p. 50.
[1368] The BGH has however interpreted German law in accordance with the Directive before it was implemented; comp. BGH 24 May 1995, *NJW* 1995, 2034.
[1369] This has since been corrected, despite objections that expressly including the contra preferentem rule would be difficult to reconcile with the system in the BGB, where the requirement of transparency was implied and could be realised through different ways, comp. P. Ulmer, 'Zur Anpassung des AGB-Gesetzes über miβbräuchliche Klauseln', *EuZW* 1993, p. 344. Baier 2004, p. 72 moreover points out that the contra legem interpretation may stand in the way of subsequent judicial control that takes the interpretation to the detriment of the consumer – or other party – as a starting point in its evaluation.
[1370] CJEU 9 April 1987 (Commission/Italy), Case 363/85, ECR [1987], p. 1733, par. 7, CJEU 23 May 1985, (Commission/Germany), Case 29/84, ECR 1985, p. 1661, par. 23.

10.3.2.3. The application of the Directive by the courts

Do courts in the interpretation of articles 305-310 BGB take into account Directive 93/13, CJEU case law, and foreign decisions to ensure the harmonised interpretation of the Directive?

In various national cases falling within the scope of the Directive, both higher courts[1371] and lower courts[1372] do not refer to the Directive or foreign case law, but rather to previous case law and literature. The decisions demonstrate that courts frequently rely on national default law to determine whether a clause is unfair. In other cases, a more active approach towards the Directive is visible.[1373]

Furthermore, in cases where the Directive has been considered, both lower courts[1374] and the BGH[1375] leave open the possibility that questions could and, for the BGH, should have been referred to the CJEU.

Notably, this does not necessarily mean that the cases in which courts do not refer to the Directive but rather national materials have been decided incorrectly – rather, it is not *harmonised* interpretation. Notably, it is not clear whether Directive 93/13 that aims for minimum harmonisation and therefore allows for differences between national laws, entails the need for completely harmonised interpretation. Possible, especially lower courts, who do not have to refer to the CJEU, are insufficiently able, or aware of the need to interpret articles 305-310 BGB in accordance with Directive and foreign decisions, especially because foreign decisions may not be sufficiently available – although the database in the EC Consumer Law Compendium provides a starting point.[1376]

Basedow[1377] rightly points out that considering the divergence of laws in this area prior to harmonisation, national courts cannot achieve harmonised interpretation independently, without the harmonising role of the CJEU, which has unfortunately not

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[1371] See for example BGH 8 February 2012, *NJW* 2012, 1431, BGH 11 June 2010, *NJW* 2010, 2873, BGH 13 April 2010, *NJW* 2010, 1742, BGH 30 March 2010, *NJW* 2010, 2041, BGH 28 January 2010, *NJW* 2010, 2046, BGH 9 November 2008, *NJW* 2009, 912, BGH 5 July 2009, *NJW* 2009, 3506, BGH 13 October 2006, *NJW-RR* 2007, 962.

[1372] See for example OLG München 9 June 2011, *NJW-RR* 2011, 1359, LG Bonn 23 February 2011, *BeckRS* 2011, 22639, LG Münster 22 February 2011, BeckRS 2011, 05151, OLG Hamburg 17 February 2010, *BeckRS* 2010, 12863, OLG München 17 January 2008, *NJW-RR* 2008, 1233; comp. also LG Heilbronn, 12 March 2009, *BeckRS* 2009, 8141.

[1373] See for example OLG Stuttgart 18 January 2006, *BWNotZ* 2007, 16, which however concerned a contract between a municipality and a business, questioned the privileged position of contracts used by notaries under the Directive and subjected them to judicial review.

[1374] See for example OLG Brandenburg 21 June 2006, *BeckRS* 2006, 8091, considering that the Directive is not applicable as it has not been established that the clause has been drafted in advance, while article 3 par. 2 Directive that states that 'a term shall *always* be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term', which also allows for the conclusion that consumers may not have been able to influence terms even if they have not been preformulated. This decision is however in conformity with a later BGH decision, BGH 15 April 2008, *BeckRS* 2008, 12098. In the light of the aim of the Directive, particularly the CJEU decision in Océano, the question arises whether the OLG Brandenburg should have established this matter of its own motion, particularly as it concerned a clause enabling the supplier to alter the price, falling within the scope of sub j of the annex to the Directive. Basedow, in: FS Hirsch 2008 p. 62 notes that in cases concerning clauses on the annex to the Directive, cases should be reffered to the CJEU.

[1375] See for example BGH 15 April 2008, *BeckRS* 2008, 12098, in which it was held that consumers should prove that they did not have an opportunity to affect the terms in the meaning of article 310 par. 3 sub 2 BGB. However, this arguably concerns the interpretation of standard terms in the sense of article 3 Directive, which defines standard terms as not individually negotiated, while stipulating in par. 2 that terms have not been negotiated when terms have been preformulated, while the second sentence expressly states that the circumstance that other terms have been negotiated does not entail that other terms will be considered negotiated as well. In contrast, the BGH considers that as the consumer negotiated other parts of the terms, he will have to prove that he did not have the chance to influence the other terms. Arguably, as it concerned the interpretation of article 3 Directive, the BGH could and perhaps should have referred this question to the CJEU. Comp. also BGH 19 November 2002, *BeckRS* 2003, 736 on the requirement of transparency, both in article 5 Directive 93/13 and in article 4 par. 4 Directive 90/314, that obliges the users of STC's to draft clauses amending the price in such a way that it enables contract parties subjected to STC's to calculate the price. Otherwise, contract parties are unreasonably disadvantaged. However, this interpretation is not likely to be contrary to the Directive. The BGH emphasises the protection of parties subjected to STC's, notwithstanding conflicting requirements set by default law that implemented Directive 90/314 on package travel.

[1376] See http://www.eu-consumer-law.org/index_en.cfm. The CLABB-database is no longer available.

[1377] J. Basedow, 'Der Europäische Gerichtshof und die verweigerte Dialog', in: G. Müller et al (eds.), *Festschrift für Günter Hirsch zum 65. Geburtstag*, Beck: München 2008, p. 58.

provided much clarity on the unified interpretation of central provisions in the Directive. However, the ability of the CJEU to do this depends upon the amount of questions referred to it by lower courts.

The relatively small number of cases before the CJEU – certainly small if compared to the number of cases before German courts – may arguably also be traced to various circumstances:

i) Concerns over lengthy procedures in relatively straightforward cases
ii) The restraint of the CJEU in providing consistent guidelines in the interpretation of Directives,[1378] especially as it may concern provisions that play an important role in the BGB such as article 307 BGB.
iii) The practice of minimum harmonisation and the view that questions on the interpretation of provisions offering more protection than the Directive need not be interpreted in accordance with the Directive, and referral to the CJEU need not be made.[1379] However, decisions of the BGH[1380] indicate that the BGH does not support this view.

Not only can it be doubted whether this is in conformity with the wider duty of conform interpretation, according to which all provisions of national law need to be interpreted in accordance with European law,[1381] it can also be doubted whether this view is consistent with the CJEU's decision to accept competence over cases which fall beyond the scope of harmonising measures, but which fall under the implemented law that extend the scope of the harmonised regime in the interest of consistency.[1382]

Thus, in the application of the Directive, courts have not interacted much with European actors or foreign actors. This may have undermined the harmonised interpretation of the Directive throughout the Union, but it has not undermined the quality of private law. To the contrary, especially the restraint of lower courts may benefit the predictability of the law for private parties, as parties do not have to rely on decisions from foreign courts that they are not familiar with, and as decisions do not suffer much delay. Also, the restraint of courts ensures that decisions are consistent with national law. However, the restraint of courts may be problematic as it may limit the awareness of consumers of their rights under the Directive. However, as German law already provided consumers with protection, this is not directly to their detriment.

In these cases, courts have not recognised interdependence and have therefore not interacted much with the CJEU and foreign courts, but this does not seem to have undermined the predictability or consistency of the law. However, the lack of interaction may eventually affect the revision of Directive 93/13 as problems in national practice do not become visible at the European level, and the CJEU has little opportunity to provide clarity on the interpretation of concepts in the Directive. Similarly, therefore, the question how competences are allocated between the CJEU and national courts, in particular whether minimum harmonisation allows for more discretion for national courts, is also not likely to be considered in the future reform of the Directive. In the long term, the lack of interaction may thus stand in the way of a more predictable development of the private law *acquis*.

[1378] See previously par. 7.4.2. and see on the interpretation of article 3 Directive by the CJEU further below, par. 10.4.1.1.
[1379] Comp. H. Heinrichs, 'Das Gesetz zur Änderung des AGB-Gesetzes Umsetzung der EG-Richtlinie über mißbräuchliche Klauseln in Verbraucherverträgen durch den Bundesgesetzgeber', *NJW* 1996, p. 2196, comp. however differently MunchKomm zum BGB/Basedow (2012), introduction to article 305, nr 20.
[1380] BGH 14 April 2010, *NJW* 2010, 2122 and BGH 15 April 2010, *NJW* 2010, 2942. In these cases, the BGH has upheld clauses falling under the European model list.
[1381] CJEU 13 November 1990, C-106/89 (Marleasing).
[1382] MunchKomm zum BGB/Basedow (2012) introduction to article 305, nr 34.

10.3.2.4. The discussion on the revision of Directive 93/13

This paragraph will ask whether actors in the attempted reform of Directive 93/13 have sufficiently recognised interdependence and interacted accordingly. How has this affected the accessibility, predictability, consistency or the responsiveness of the law on STC's?

The proposal for a Directive on consumer rights was preceded by a more general consultation on the reform of the consumer *acquis*.[1383] This 2007 consultation, launched in February 2007 and closed in May 2007, followed previous consultations to cope with problems in the consumer *acquis*, in particular problems of fragmentation. To increase the quality of the consumer *acquis*, the consultation suggested a horizontal approach rather than a vertical approach. The consultation can be criticised for steering and narrowing the debate, as it set out a limited number of options.[1384] The consultation further consisted of more detailed questions that presupposed the preference for a horizontal instrument. The proposal for a Directive on consumer rights[1385] was published in October 2008.

The proposal was accompanied by an impact assessment report.[1386] Although the report recognises, in passing, the relevance of enforcement mechanisms and self-regulation for the level of consumer protection in Member States,[1387] it identifies the minimum harmonisation clauses as the main source of fragmentation,[1388] which it uncritically considers as the source of problems for the internal market. The impact assessment has assessed more options than originally envisaged in the 2007 consultation.[1389] However, the suggestions to use self-regulation in addition to the preferred policy options and the suggestion to raise awareness have not been followed in the Directive.[1390] The responses to the consultation[1391] are not based on the impact assessment report and do not focus on the various policy options presented in the report, nor are suggestions made with regard to additionial measures that the report recognised as useful.

Consequently, the extent to which the impact assessment contributed to the evidence-based decision making was limited. It also did not draw attention to the optimal use of techniques in the revision of the Directive.

The 2008 proposal for Directive 2011/83 on consumer rights, which initially also included the revision of Directive 93/13, was not accompanied by a separate German consultation, but it has nevertheless been discussed, both in legal journals[1392] as well as newspapers.[1393] The lack of a separate consultation also does not mean that the German legislator did not take a position in the debate. In its 2009 decision, the *Bundesrat*[1394] indicated various problematic points in the proposal, that also come back in its response of the *Bundesrat* to the European consultation:[1395]

[1383] COM (2006) 744 final.
[1384] See previously more generally par. 8.2.1.2.
[1385] COM (2008) 614 final.
[1386] Commission staff working document accompanying the proposal for a Directive on consumer rights, Impact Assessment Report, available at http://ec.europa.eu/consumers/rights/docs/impact_assessment_report_en.pdf.
[1387] Impact assessment report, p. 12, note 11.
[1388] Impact assessment report, p. 8.
[1389] COM (2008) 614 final, p. 5-6.
[1390] Impact assessment report, p. 21.
[1391] See http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/responses_green_paper_acquis_en.htm.
[1392] See for example K. Tonner, M. Tamm, 'Der Vorschlag einer Richtlinie über die Rechte der Verbraucher', *JZ* 2009, 277.
[1393] See especially S. Lorenz, 'Der geplante Verbraucherschutz in Europa ist trügerisch', *FAZ* 14 July 2009.
[1394] BR-Drucksache 765/08, p. 3, 6 (EU: BR-Drucksache 765/08 also notes (par 3) that proposal is not in accordance with better legislation programme)
[1395] Response of the BMJ to the Green Paper on the review of the consumer acquis, COM (2006) 744, p. 4, 16, 17, 18, in accordance with the previously agreed position in the Bundesrat, BR-Drucksache 112/07. Responses to the consultation are available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/responses/ms_bundesministerium.pdf,

a) The maximum harmonisation approach, which would lead to a *de facto* European consumer contract law that would make national law largely obsolete, and that would would lead to legal uncertainty that would hinder rather than help cross-border trade.
b) The binding model list that would pursue maximum harmonisation as various clauses are not in accordance with dogmatically developed concepts ('*Zivilrechtsdogmatik*') and German practices, also pointing to the discussion preceding Directive 93/13
c) The subjection of individually negotiated to judicial control, as this question was also an important point in negotiations preceding Directive 93/13
d) The extension of the scope of the Directive to the main terms of the contract, which seems particularly difficult to reconcile with the *Richtigkeitsgewähr* as these terms will typically be the primary object of consideration for the consumer.

The lack of a seperate German consultation has not impeded German stakeholders from responding to the European consultation. Interestingly, many business associations take a position similar to the Bundesrat.[1396] Some business stakeholders support a black list or a grey and black list in the interest of predictability, although it remains unclear how such a list would relate to articles 308 and 309 BGB. [1397] Interestingly, the Bundesverband Direcktvertrieb Deutschland [1398] also refers to the drafting process of Directive 93/13 in rejecting the extension of judicial control of unfair clauses, while supporting a black list. In contrast, consumer organisations [1399] do not advocate for a binding black list under a Directive pursuing maximum harmonisation, as this would lower the level of consumer protection in the German legal order and necessitate the adaptation of a successful system. Consumer organisations further point out that national default law served as a standard for assessing the fairness of a clause, while they also do not object to extending judicial control, criticising the idea of negotiations and emphasising the weak position of consumers in negotiations.[1400] Thus, stakeholders, occassionally also criticising the European consultation procedure,[1401] seem to take positions in accordance with the interests of their members, with business stakeholders supporting maximum harmonisation, [1402] and with consumer organisations arguing for minimum harmonisation.[1403]

However, many of the responses of stakeholders are brief, which limits their value in the debate.[1404] Also, it can be doubted whether the debate included all relevant German

[1396] See the response of the BDWi, Deutscher Notarverein, and Deutsche ReiseVerband, the HDE, BAG and bvh, and the VDMA, as well as the Wettbewerbszentrale.
[1397] See the response of the Bundesverband deutscher Banken, the German Bar Association, the Deutsche Bank, the Deutschen Versicherer, the Markenverband, the ZVEI, the Bundesrechtsanwaltskammer, and the ZGE, p. 4.
[1398] See the answer of the Bundesverband Direcktvertrieb Deutschland, p. 6.
[1399] See the answer of the Verbraucherzentrale Bundesverbandes, p. 13-14, and the ECC Germany, p. 7.
[1400] See the answer of the Verbraucherzentrale Bundesverbandes, p. 15-16, VerbraucherKommission Baden-Württemberg p. 11, pointing out that various Member States have extended judicial control, ADAC p. 4-5.
[1401] See for example the response of the Bundesnotarkammer, p. 2, particularly sharply the Deutscher Notarverein, p. 1-2, as well as the Bundesverband Direcktvertrieb Deutschland, p.7, as well as the response from B. Heiderhoff and M. Kenny, p. 1.
[1402] See for example the response of the Bundesrechtsanwaltskammer, p. 5, the German Bar Associaiton, p. 3, the Deutscher Notarverein, p. 9, the Detusche Reiseverband, p. 1, the Deutschen Versicherer, p. 5, the HDE, BAG, and bvh, p. 3, the Markenverband, p. 3, the ZVEI, p. 2, the ZGE, p. 4, thre Wettbewerbszentrale, p. 3, more cautiously the Bundesverband Direcktvertrieb Deutschland, p. 4, as well as the Deutsche Bank, p. 3, and Vorwerk, p. 3, differently the responses of BDWi, p. 2, as well as the VDMA, p. 3.
[1403] See the elaborate response of the Verbraucherzentrale Bundesverbands, p. 5-9, and the Verbraucherskommission Badem-Wurtenberg, also extensively, p. 3-7, as well as the ECC Germany, p. 5, and the ADAC, p. 1.
[1404] Some responses are an exception, such as the response of the Bundesverband Direktvertrieb Deutschland that draws attention to the inclusion of subjects that had not been harmonised previously in the 2008 draft, stating that this course was considered unattractive not only by Member States but also by businesses, because Member States with a history of superogatory implementation – like Germany – would likely also extend the scope of provisions in the draft, which would inhibit the freedom of contract for businesses in cross-border contracts. Various responses from national stakeholders may also be

stakeholders – especially if compared to the debate preceding the AGBG, in which around 150 stakeholders were consulted.[1405] Unfortunately, the responses from some international stakeholders that could have otherwise have provided valuable input were rather brief and remained general.[1406] The responses of stakeholders also seem to have been drafted in cooperation, considering the close resemblance between the wording of the responses from different stakeholders. [1407] Including more actors, especially actors such as the *Verbraucherschutzverein*, with its experience in the enforcement of the Directive, widens the debate and helps to ensure that the debate does not overlook relevant insights.

The focus of the German legislator logically is a national one, which should however not deter national legislators from taking into acocunt the approaches of foreign legislators to implementation, or their views in the debate, or the needs and preferences of international trade. This is unfortunately not the case.

In the discussion, references to comparative law have been few, notwithstanding the occassional reference to comparative law in academic responses to the consultation,[1408] and some stakeholders,[1409] as well as the Ministry, referring to comparative analysis on the implementation of eight Directives,[1410] but not to the regimes of other Member States, nor to CJEU case law. More attention to comparative law research might provide valuable insights on existing implementation practices and obstacles and possible objections to harmonisation.[1411] Comparative research on the implementation of the Directive is available in the EC consumer law compendium.[1412]

Both the European and the German legislator have adopted a narrow view on the reform of the Directive. The European legislator sought to to limit the fragmented approach in the private law *acquis*, instead adopting a more horizontal approach reminiscent of national law. The German legislator moreover attempted to ensure that the Directive would be in accordance with national law and national principles. The European legislator has unfortunately narrowed and steered the debate without sufficiently considering the potential options. In contrast, the German approach is directed at the status quo, and does not consider how the Directive has functioned and what improvements are possible.

This preference for the status quo is particularly visible in the rejection of the suggestion that the model list in the Annex to the Directive should become binding – after all, notwithstanding previous negotiations, the developments since the Directive has been established may merit a reconsideration of the indicative character of the EU model list, especially considering the very limited role of the EU model list in the German legal order.

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interesting, such as the reaction from the Deutscher Notarverein and the Deutschen Versicherer, as well as the VerbraucherKommission Badem-Württemberg that explicitly refers to implementaiton practices in other Member States.

[1405] H.-D. Hensen, 'Zur Entstehung des AGB-Gesetzes', in: A. Heldrich, P. Schlechtriem, E. Schmidt (eds.), *Recht im Spannungsfeld von Theorie und Praxis, Festschrift für Helmut Heinrichs zum 70. Geburtstag*, Beck: München 1998, p. 76.

[1406] Especially the views from the ICC, but the views from Visa Europe might also have been interesting.

[1407] Particularly the responses of the Bundesverband Direktvertrieb Deutschland, the Federation of German Industries, the Association of German Chambers of Industries and Commerce, the National association of German commercial agencies and distribution, and the German Confederation of skilled crafts and small businesses.

[1408] Comp. the responses of Heiderhoff and Kenny, while the comment of Micklitz and Reich involves the discussion at a European law and CJEU case law.

[1409] Comp. the response of Vorwerk, which however does not refer to the quesitons of the consultaiton on the control of unfair clauses.

[1410] Response of the BMJ, p. 4, 17.

[1411] N. Jansen, 'Klauselkontrolle im Europäischen Privatrecht. Ein Beitrag zur Revision des Verbraucheracquis', *ZeuP* 2010, p. 69.

[1412] Available at http://www.eu-consumer-law.org/index_en.cfm as well as comparative research on implementation, see especially Baier 2004, and the special issue of the *ERPL* in 1997.

Thus, the shortcomings in the interaction between actors have limited the debate in the reform of the Directive. The attempts to streamline the debate have not resulted in actual reform and it is not clear whether and how the 1993 Directive will be reformed. Actors with relevant insights have not been consulted or have only provided brief responses, which may increase the chance that a reformed Directive will overlook relevant insights, which may undermine the responsiveness of a reformed Directive.

10.3.2.5. Conclusion on the development of German law on STC's and harmonisation

Have German actors, in the implementation of Directive 93/13, adequately taken into account interdependence in ensuring the predictability, accessibility, consistency and responsiveness of the law and have they interacted accordingly? How has that affected the comprehensibility of private law?

In the implementation of Directive 93/13, German state actors have adopted restraint, which may have benefitted predictability, consistency and responsiveness for private parties. Eventually, however, the restraint in the interaction between German and European actors may leave questions on the interpretation of the *acquis* and the allocation of competences between courts and legislator at the national and European level unresolved, which in turn undermines extent to which the private law *acquis* develops in accordance with benchmarks of predictability, accessibility, consistency and responsiveness.

The development of Directive 93/13 did not prompt the German legislator to reconsider the AGBG or its choice for *Sonderprivatrecht* and later codification. However, the active participation of German actors at the European level increases the chance that the *acquis* will develop in accordance with German law, which limits the extent to which the *acquis* will undermine the BGB's ability to contribute to benchmarks of predictability and consistency. The German approach may therefore provide an example for other legislators. However, as the *acquis* pursues different aims than German general private law, which characteristically does not pursue a specific aim but rather is based on notions of private autonomy, should the *acquis* develop in the same way as general private law?

10.3.3. German law on STC's and internatonal trade

The development of treaties and international trade may prompt state actors to interact with foreign actors and non-state actors. The approach of German actors is not uniform: the German legislator has rejected regulatory competition, but has taken into account insights from legal practice to help ensure the responsiveness of the law. The private initiative for regulatory competition has rightly not prompted the German legislator to change this approach. The restraint of the legislator is also compensated by courts that are more inclined to interact with foreign, European and international state and non-state actors in cases decided under German law, which has benefitted the responsiveness of German law to international practice.

Paragraph 10.3.3.1. will consider whether internationalisation has induced the German legislator to take into account the views of foreign legislators and non-state actors. Paragraph 10.3.3.2. will ask whether courts have interacted with foreign courts and non-state actors in the interpretation of STC's in international contracts. Paragraph 10.3.3.3. will end with a conclusion.

10.3.3.1. Regulatory competition

This paragraph will ask whether the German legislator, in the development of the law on STC's, has taken into account the development of law by foreign legislators and how this has affected the predictability, consistency, accessibility and responsiveness of the law on STC's.

Paragraph 10.3.3.1.1. will consider the interaction with foreign legislators and paragraph 10.3.3.1.2. will consider the interaction with non-state actors in the drafting of the AGBG. Paragraph 10.3.3.1.3. will consider the interaction with non-state actors who drafted a private initiative to enhance regulatory competition. Paragraph 10.3.3.1.4. will end with a conclusion.

10.3.3.1.1. Regulatory competition: undesirable in the law on STC's

The German legislator originally did not consider regulatory competition as a challenge to 'improve' the law. This does not mean that the Germna legislator could not take into account insights from comparative law; the draft was preceded by extensive comparative research.[1413] The idea of amending the law contradicts the typical reestraint of the legislator in amending private law in the interest of a stable, predictable development of private law.[1414] Accordingly, the AGBG effectively provided a stable framework for the development of law.[1415]

Until 1986, the AGBG, included in a choice of law clause in its grey list. Thus, choice of law clauses were likely unfair if the choice of law was not based on a justifiable interest, which was amended after Germany ratified the Rome Convention. However, in the draft implementation of the Directive, proposed article 12 did not only, in accordance with article 6 par. 2 Directive, prohibit a choice of the law of non-member states, but more generally prohibited choice of law. Reich[1416] doubts whether this extension would have been covered by article 8 Directive. Notably, an extension of this article to business contracts would breach

[1413] See especially the Gesellschaft für Rechtsvergleichung, *Richterliche Kontrolle von AGB*, 1968.
[1414] P. Ulmer, 'Zur Anpassung des AGB-Gesetzes über miβbräuchlige Klauseln in Verbrauchersverträgen', *EuZW* 1993, p. 339.
[1415] J. Schmidt-Salzer, *BB* 1995, p. 735.
[1416] N. Reich, 'The implementation of Directive 93/13/EEC on unfair terms in consumer contracts in Germany', *ERPL* 1997, p. 168.

the freedom of choice of law in international business contracts in article 3 Rome I Regulation.

Thus, choice of law was an escape route from domestic mandatory law that should be blocked. This approach is in accordance with the idea that regulatory competition can lead to a 'race to the bottom', which can also be deduced from the German response to the 2006 consultation on the review of the consumer *acquis*. Accordingly, the *Bundesrat*[1417] welcomed the decision to harmonise the law in this area, stating that the harmonisation of the law on STC's to the high level of protection in Germany would benefit German businesses who were at a disadvantage because of the high level of protection of consumers in German law. Thus, regulatory competition that results in the application of German law is not rejected.

10.3.3.1.2. Interaction with non-state actors

If the legislator does not seek to compete with other legislators in the development of the law, it is also possible to draft an attractive regime by taking into account the needs and preferences of transnational legal practice.

The drafting of the AGBG was primarily directed at the codification of case law that would also make the law more accessible and consistent for contract parties. In the drafting of the AGBG, over 150 stakeholders, both business and consumer representatives, have been consulted on the draft AGBG,[1418] and have had the opportunity to discuss the draft.

Accordingly, the amended draft extends the scope of clauses subject to judicial control while limiting judicial control for clauses converging with default law. The draft also refers to individually negotiated clauses that are not subject to judicial control, while the referrence to written contracts was dropped. Also, some clauses under articles 10 and 11 were nuanced, while article 13, which became article 24 AGBG, stipulated that business contracts were also subject to judicial control, while also referring to business practices.[1419]

Thus, the German legislator has sought to draft the law in such a way that it is a regime that develops consistently and predictably, which has prompted other states to consider the AGBG and German experiences, [1420] especially as the German regime on STC's was one of the first regimes to be established. Also, German criticism on the1990 draft Directive led to important amendments in the Directive, which had, in accordance with the French regime, pursued a more general control over clauses in consumer contracts.

Not all of the amendments can be traced to the consultation of stakeholders; thus, the extension of judicial control to business contracts had also been discussed at the *Deutschen Juristentag*.

Although these discussions have primarily focussed on national legal practice, the German judiciary does seem to take into account international legal practice. Brandner[1421] already noted that although BGH case law is not always unequivocal, it seemed to evaluate clauses in business contracts in most branches less strictly than clauses in consumer contracts, depending on the interest protected by the judicial control of clauses.

[1417] Decision of the Bundesrat of 1 March 1991, BR-Drucks. 611/90, p. 1.
[1418] BR-Drucks, 360/75, 30.5.1975.
[1419] The amended draft was not published. See in more detail H.D. Hensen, 'Zur Entstehung des AGB-Gesetzes', in: *Festschrift Heinrichs*, p. 351-352.
[1420] For example the Dutch legislator, see further chapter 11.
[1421] Brandner, in: Zehn Jahre AGB-Gesetz, p. 50.

10.3.3.1.3. The private initiative for regulatory competition

The careful preparation of the AGBG may also be a reason to continue to exercise restraint in the face of later proposals for reform in accordance with regulatory competition, particularly the proposal for reform from private actors[1422] that explicitly refers to the initative of 'Law – made in Germany'.[1423]

The private initiative was developed by the Industrie- und Handelskammer Frankfurt am Main.[1424] This draft has been discussed,[1425] and an amended draft has been published by the German Bar Association, which emphasises that it does not seek to represent stakeholders' interests through this draft.[1426] The draft is accompanied by examples that should support their argument for revising the law.[1427]

The proposal from the German Bar Association targets the judicial control of STC's in business contracts, in particular the judicial evaluation of business contracts under article 307 BGB and the indirect effect of articles 308 and 309 BGB. The draft emphasises that STC's that have been negotiated, even if no changes result from negotiation, should not be considered STC's in the sense of article 305 BGB, in contrast to current BGH case law.[1428] Moreover, the draft suggests a more lenient evaluation of STC's in business contracts by stipulating that clauses are not unreasonable depending on the content of the contract, the circumstances of the conclusion of the contract, and business practices. Interestingly, the draft from the German Bar Association explicitly states that the law with regard to the inclusion of STC's is not in need of amendment.

Interestingly, the draft stresses that the protective aim of legislator towards businesses is undermined in cases of transnational trade. In transnational cases, a choice of law to the detriment of German businesses is permitted, while foreign businesses may subject clauses to judicial control under articles 305-310 BGB. Thus, as the law in this area fails to adequately cope with international practice, in particular by imposing national standards on international trade, it might just as well facilitate the preferences of international trade. In turn, if businesses in international trade are subject to no or less intense judicial control, the question arises whether a similar standard should not also be applied for domestic contracts.

Moreover, revision of the law in the light of regulatory competition is in line with the objectives of the EU to establish an internal market, if the revision facilitates the use of STC's in cross-border contracts, and if the revision leads to the convergence of national laws in this area, which, if going far enough, would take away the need for harmonisation.

Shoud the limited ability to maintain protective standards prompt the German legislator to take more note of the preferences of international trade and national stakeholders?

So far,[1429] there has been no official reaction from the German legislator towards the proposals. Constitutional constraints may arise, as article 33 par. 4 GG may stand in the way of a too prominent role of stakeholders in the drafting of legislation. In particular, it stands in the way of a blanket approval of the proposal by the German legislator without substantive, critical democratic debate in Parliament. The current proposal should not lead to reform because of the following shortcomings:

1) The draft from stakeholders is contradictory.

[1422] See http://www.frankfurt-main.ihk.de/recht/themen/vertragsrecht/agb_recht_initiative/.
[1423] Critically Dauner-lieb & Axer, *ZIP* 2010, p. 309, who note that advertising with German law while simultaneouslty arguing it is in need of reform, is not convincing.
[1424] See http://www.frankfurt-main.ihk.de/recht/themen/vertragsrecht/agb_recht_initiative/.
[1425] See for an overview http://www.frankfurt-main.ihk.de/recht/themen/vertragsrecht/agb_recht_initiative/.
[1426] Available at http://anwaltverein.de/downloads/Stellungnahmen-11/DAV-SN-23-2012.pdf.
[1427] See http://www.frankfurt-main.ihk.de/imperia/md/content/pdf/recht/AGB_b2b_Fallbeispiele_aus_der_Praxis.pdf.
[1428] BGH 19 May 2005, *NJW* 2005, 2543.
[1429] December 2012.

The list of examples accompanying the proposal,[1430] claims that German users of STC's may not opt out of German law entirely, and as a result, their clauses are subjected to the strict German judicial evaluation under article 307 BGB. In contrast, the draft claims that currently, German businesses tend to opt out from German law, especially opting for Swiss law and English law. The list of examples goes on to claim that in cases where a German business is subjected to a clause that would be considered unfair in German law, will not be able to 'pass on' this clause to a German subcontractor, opting instead for a foreign subcontractor to whom this potentially objectionable clause will be passed on.

2) The examples accompanying the proposal do not sufficiently take into account that the BGH is more lenient in its evaluation of clauses in international cases.

This becomes particularly clear from example 12 that argues that a clause requiring a surety to be available upon request will generally be held ineffective. Even though the BGH[1431] has held these clauses ineffective in domestic cases, international cases may be judged differently. The OLG Stuttgart[1432] upheld a clause described in this example, denying that parties – big businesses – in this case were hardly in need of protection. The OLG upheld the decision from the LG Stuttgart,[1433] which distinguished between previous cases on sureties that concerned domestic cases and international cases.

3) Both the original proposal and the amended proposal do not make sufficiently clear how small businesses would be protected under articles 305-310 BGB, and how these cases would be delineated from cses where small businesses have agreed to STC's while not hindered by a weaker bargaining position.

Possibly, however, the approach defended in Dutch law could be taken as a starting point: where a business is in a bargaining position similar to a consumer's bargaining position, and it oncerns a contract not different from normal consumer contracts, businesses may invoke the indirect effect of articles 308 and 309 BGB. Notably, however, Dutch law in this point has hardly developed. Regardless, the draft does not consider this possibility.

4) The draft overlooks the normative view underpinning articles 305-310 BGB, instead emphasising 'law as a product'.

The argument that the legislator should not even attempt to pursue a normative system because it is not able to do so indepedently is not particularly appealing. Even if the aim of the German legislator is undermined, this does not make the question how the legislator should cope with this development in a manner that preserves the normative values underlying the law irrelevant, especially as the law might increasingly develop inconsistently and less in accordance with society's views on justice.

5) The attractiveness of German law might also be inhibited by other factors.

Berger[1434] argues that case law on the interpretation of international and foreign clauses is limited, and has developed through cases on consumer contracts and relatively simple contracts. Consequently, it is not a law developed for (international) businesses contracts.

6) Contrary to the idea of regulatory competition, the draft has paid limited attention to developments from other legislators.

The draft from the German Bar Association[1435] explicitly refers to the proposal for a Regulation on a draft CESL, and notes that if the draft takes the negotiation ('*verhandlen*') of STC's as a starting point,

[1430] Available at http://www.frankfurt-main.ihk.de/imperia/md/content/pdf/recht/AGB_b2b_Fallbeispiele_aus_der_Praxis.pdf, examples 2, 5 and 8.
[1431] BGH 18 April 2002, *NJW* 2002, 2388.
[1432] OLG Stuttgart 1 December 2010, *BeckRS* 2011, 2432.
[1433] LG Stuttgart 3 May 2010, *BeckRS* 2010, 19376.
[1434] K.P. Berger, 'Für eine Reform des AGB-Rechts im Unternehmerverkehr', *NJW* 2010, p. 466.
[1435] Draft, p. 16.

this will distinguish it from the proposal that takes the joint negotiations ('*aushandeln*') as a starting point. Although the draft recognises that especially English and Swiss law are a favourite choice of contract parties, it does not look at German or Swiss law to establish what is so attractive about these laws. The draft does not ask how the reform may make German law a competitive law within the Union that will be elected by both foreign and German parties. Rather, the draft aims to make German law less unattractive for German parties.

As comparative contract law is readily available, the inaccessibility of relevant materials should not be an obstacle to more attention to comparative law. Moreover, it should be noted that the draft, until now, has especially been circulated between German parties. Since the proposal has been drafted in the context of regulatory competition, it would however not be illogical to contact foreign parties, especially parties in Member States that are important trade partners of Germany, to establish whether they find German law exceptionally unattractive, and if so, why.

7) The draft does not sufficiently consider other options that may facilitate cross-border trade.

The draft does not address the extent to which prominently used STC's in international contracts are evaluated, and does not consider the possibility to encourage, for example, the development of guidelines for the interpretation of clauses in international contracts. Also, the draft leaves open the possibility that parties may circumvent the evaluation of clauses by opting for ADR. The use of collective negotiations, which may be a reason for the judiciary to evaluate STC's less strictly, is also not considered.

10.3.3.1.4. Conclusion on regulatory competition

The German legislator has rejected the idea of regulatory competition in the area of mandatory law protecting weaker parties. However, the legislator has recognised the added value of comparative insights, considering the comparative research and the more general initiative for ´Law - made in Germany'. The restraint of the German legislator in amending the law benefits predictability, and the attention for national stakeholders benefits the responsiveness of the law to business practices and preferences. The restraint of the German legislator has moreover not stopped foreign legislators and the European legislator from turning to German law as a source of inspiration.

The private initative for regulatory competition demonstrates that the preference of businesses should not override the development of the law in accordance with legal views on justice, but it does rase questions on the ability of the legislator to ensure that the law develops in accordance with legal views on justice. The German legislator has not expressly recognised interdependence in this area, but at the European level, it has actively advocated for the development of the acquis with a high level of consumer protection, which may prevent that the law in this area does not undermine the high level of consumer protection in German law. Eventually, however, the German legislator does not have a decisive say in the reform of Directive 93/13, and it is possible that reform may oblige the German legislator to lower consumer protection. If this is the case, German actors will have to consider alternative ways to preserve the responsive development of private law.

10.3.3.2. The interpretation of international contracts

As international trade develops, German courts are faced with more international cases. [1436] The approach of the German courts differ depending on the question whether a case is

[1436] See for the evaluation of STC's article 307 BGB, not considered in this paragraph, below, par. 10.4.3.

decided under German law or under European or international law. Its approach to international and European state and non-state actors in cases decided under German law may increase the responsivenes. In contrast, the restraint of courts in cases decided under international or European law may inhibit responsiveness, as well as the consistent and predictable interpretation of clauses under treaties and European law, especially for foreign parties who are accustomed to courts taking into account international and European sources.

Paragraph 10.3.3.2.1. will consider the decisions of courts on the criteria whether clauses have been individually negotiated. Paragraph 10.3.3.2.2. will consider the valid inclusion of STC's. Paragraph 10.3.3.2.3. will turn to the adequate availability of STC's and paragraph 10.3.3.2.4. will address the interpretation of clauses. Paragraph 10.3.3.2.5. will end with a conclusion.

The paragraph distinguishes between these questions as different sources of law may be applicable per question. Moreover, the paragraph will not only look at international cases, but compare decisions in international cases to decisions in domestic cases, to determine whether courts adopt a different appoach to domestic decisions, which may also be relevant for the consistent development of the law on STC's.

10.3.3.2.1. Negotiating STC's

Article 305 BGB requires that STC's have been presented ('*gestellt*'), and not negotiated ('*ausgehandelt*')[1437] Notably, in some international cases, the question whether a clause has been presented or not in the sense of article 305 BGB is not addressed as European law or international law may precede article 305 BGB, and the question whether clauses have been negotiated is not similarly emphasised under European or international regimes.[1438] Interestingly, the ICC[1439] has distinguished between B2C and B2B contracts, and has held that clauses that parties have negotiated on, but that have not been altered can be considered as 'negotiated' in the sense of article 305 BGB. The ICC extensively refers to BGH case law and goes on to follow criticism of the requirement of '*aushandeln*', and the distinction between STC's and individually negotiated clauses as this distinction overlooks the possibility that parties will often not be interested in negotiating on STC's, which later will provide them with an opportunity to challenge those terms.[1440]

The ICC decision will likely not be followed by German courts that consider the unequal bargaining power between parties when one party has set his STC's to be either accepted or rejected by his counterparty. The BVerfG[1441] has emphasised the need to prevent *Fremdbestimmung* in the use of STC's, including model contracts. Accordingly, the OLG München[1442] rejected the individual negotiation of clauses in international cases, referring to BGH decisions in domestic cases.[1443]

BGH case law may however be more lenient for clauses in international business contracts.[1444] In rare cases, the BGH[1445] has referred to foreign courts. The BGH may also

[1437] Similarly, article 449 HGB refers to *aushandeln*, which has been interpreted in conformity with article 305 BGB, see BGH 1 December 2005, *BeckRS* 2006, 3324.
[1438] Comp. for example relatively recently OLG Brandenburg 26 June 2012, *BeckRS* 2012, 15696, with further references.
[1439] ICC 29 January 2001, *SchiedsVZ* 2005, 108.
[1440] Graf von Westphalen/Vertragsrecht und AGB-Klauselwerke/Schöne (30. Ergänzungslieferung 2012), Stromlieferungsverträge, nr 48.
[1441] BVerfG 7 September 2010, *NJW* 2011, 1339.
[1442] OLG München 7 March 1986, *BeckRS* 2010, 25740.
[1443] BGH 3 July 1985, *NJW-RR* 1986, 54.
[1444] BGH 15 February 2007, *NJW* 2007, 2036 held that a clause appointing the shipowner as transporter was individually negotiated as the clause was printed in bold on the front of the bill of lading. Wolf/Lindacher/Pfeiffer/AGB-recht/Hau (2009), AGB

evaluate clauses more leniently when STC's have been drafted by a relatively neutral institute in which interests from all relevant contract parties have been represented.[1446]

The line in domestic cases is considerably stricter, as the BGH[1447] has distinguished between '*aushandeln*' (jointly negotiating) and '*verhandeln*' (considered). *Verhandeln* did not meet the requirements for individual negotiations in article 305 BGB, which accordingly also speaks of '*aushandeln*', which requires that the user of STC's has to seriously make the content of his STC's subject to negotiation, enabling his potential contract party to defend his own interests. This means that the contract party must have been able to influence the content of the STC's, which turn presupposes that the contract party has adequately understood the STC's, which may require that he is educated on the content of STC's.

Thus, German courts take a stricter approach in deciding whether STC's have been negotiated – and therefore do not fall within article 305 BGB – in domestic cases that are developed in line with the law on B2C contracts. In international cases, German courts are more likely to take into account the role of neutral organisations and in rare cases, foreign courts.

10.3.3.2.2. The valid inclusion of STC's

The question whether STC's have been included in international contracts may be answered under different regimes that do not always leave room for the additional applicability of article 305 BGB. Moreover, in addition to article 305 BGB, other provisions may also be applicable, especially article 312g BGB, implementing Directive 2000/31 on e-commerce, and article 246 EGBGB.[1448] This paragraph will turn to international cases decided under respectively the CMR, CISG, Regulation Brussels I, or the Lugano Convention,[1449] and German law, and contrast these decisions with domestic cases.

In cases under the CMR, German courts have expected foreign contract parties to be familiar with the use of the often used terms in transport contracts, the *Allgemeine Deutsche Spenditeurbedingungen* (hereafter 'ADSp'), considering their prominent use within the EU. As the CMR does not aim to establish a comprehensive regime for transport contracts, insights from German law or other applicable law may also be relevant.[1450] Accordingly, the BGH[1451] has taken into account foreign laws and foreign decisions.

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im internationalen Geschäftsverkehr, nr 4 argue that the BGH may accept that clauses have been drafted taking into account various interests, which may lead to less intense judicial evaluation. Comp also BGH 17 February 2010, *NJW* 2010, 1131, a domestic case between two private parties, where the BGH held that the question whether STC's had been presented depended on the question which party had introduced the STC's – drafted by third parties – in the negotiations and required the use of these STC's. The BGH pointed out that the assumption that STC's had been presented by the seller was not applicable beyond B2C contracts.See also BGH 14 May 1992, *NJW* 1992, 2160 also points to contracts based in which the interests of parties have been adequately balanced.

[1445] BGH 15 February 2007, *NJW* 2007, 2036.

[1446] Wolf/Lindacher/Pfeiffer/AGB-Recht/Hau (2009), AGB im internationalen Geschäftsverkehr, nr 57, see for example BGH 26 June 1997, *NJW-RR* 1997, 1253, although this seems not to have been considered in BGH 28 June 2001, *NJW-RR* 2002, 536.

[1447] BGH 19 May 2005, *NJW* 2005, 2543, confirming previous decisions in domestic cases in BGH 18 April 2002, *NJW* 2002, 2388, and BGH 3 November 1999, *NJW* 2000, 1110.

[1448] Article 22 Directive 2006/123 also contains information duties and may also be relevant, but it has not been implemented in the BGB; see further BT-Drucks. 16/10493. Notably, however, article 312g BGB is limited to contracts for the delivery of goods or services, although the Directive is not limited to these contracts, while the limitation to merchants in the sense of article 14 BGB may also be diverge from service providers in the Directive, see MunchKomm zum BGB/Wendehorst (2012) article 312g, nr 9-10.

[1449] Regulation Brussels I replaces the European Execution Treaty and is almost identical with the Lugano Convention between Member States of the European Free Trade Organisation.

[1450] Ferrari/Kieninger/Mankowski u.a., Internationales Vertragsrecht/Ferarri (2011), article 1 CMR, nr 3.

[1451] BGH 26 March 2009, *NJW-RR* 2010, 247.

In previous cases, the ADSp have similarly been held applicable on the basis of silent agreement,[1452] while courts expressly held that this was not contrary to articles 31 and 41 CMR. These decisions were in accordance with BGH case law in domestic cases.

In cases falling under the CISG, the BGH[1453] has not referred to foreign materials, instead addressing diverging opinions in German literature. German lower courts[1454] have followed the BGH and only rarely refer to foreign courts.[1455]

For the valid inclusion of jurisdiction clauses, article 23 Brussels I or article 17 Lugano Convention plays a central role. The BGH[1456] has ccoridngly referred to CJEU case law, and interpreted the requirements of article 17 Convention strictly, although it excepted an agreement on relative competence ('*Zuständigkeitsvereinbarung*') from Brussels I holding that the Regulation did not provide rules for the valid establishment of such an agreement, which had to be determined in accordance with applicable (English) law. Nevertheless, it held that the requirements in article 23 Brussels I had been met. The LG München[1457] similarly referred to the Convention and CJEU case law, but also to German case law and literature.

In international cases decided under German law, the BGH[1458] has taken into account business practices and foreign – Dutch – law. Notable, the knowledge and experience of international contract parties is often estimated higher than in domestic cases.[1459] The decision of the OLG Karlsruhe[1460] indicates that these BGH decisions may not always be followed.

In contrast, in domestic cases, the BGH[1461] has adopted a much stricter approach. The inclusion of STC's in the contract under article 305 BGB, while not requiring explicit confirmation, does require agreement on the inclusion of STC's, either silently or explicitly. Even though handing over the text of STC's is not required as such, the user of STC's needs to refer unequivocally to the STC's he wishes to use, in such a way that contract parties cannot doubt their application while also being able to read them. This is also true if it concerns often used clauses. In cases of battle of forms, businesses asserting the application of their standard terms cannot assume that their contract party agrees with this application, in particular if the other party's terms contain a clause rejecting the applicability of other parties' terms and conditions.[1462] However, if parties have done business with each other for a considerable time, the inclusion of STC's can be made silently.[1463] In these cases, only converging clauses will be applicable.[1464]

[1452] OLG Schleswig, 25 May 1987, *NJW-RR* 1988, 283 and LG Gießen 31 July 2008, BeckRS 2009, 395.
[1453] BGH 31 October 2001, *NJW* 2002, 370. See subsequently BGH 9 January 2002, *NJW* 2002, 1651, followed by OLG Koblenz 1 March 2010, 2 U 816/09, http://www.globalsaleslaw.com/content/api/cisg/urteile/2126.pdf. See for an overview Kröll/Mistelis/Viscasillas, UN-Convention on the International Sales of Goods (CISG)/Ferrari (2011), article 19, nr 14-17.
[1454] OLG Frankfurt am Main 26 June 2006, 26 Sch 28/05 , http://www.cisg-online.ch/cisg/urteile/1385.pdf, OLG Jena 10 November 2011, *BeckRS* 2011, 3846, and OLG Celle 24 July 2009, *NJW-RR* 2010, 136.
[1455] OLG Düsseldorf 23 March 2011, *BeckRS* 2011, 17832 similarly followed BGH case law but referred primarily to article 8 CISG as well as a decision from the Hoge Raad, published in a German journal.
[1456] BGH 9 March 1994, *NJW* 1994, 2699, confirmed in BGH 25 February 2004, *NJW-RR* 2004, 1292.
[1457] LG München 29 May 1995, *NJW* 1996, 401.
[1458] BGH 4 March 2004, *BeckRS* 2004, 3238, previously also BGH 18 June 1971, *NJW* 1971, 2126 and BGH 6 December 1990, *NJW-RR* 1991, 570.
[1459] K.P. Berger, 'Die Einbeziehung von AGB in internationale Kaufverträge', in: *Festschrift Horn*, p. 4.
[1460] OLG Karlsruhe, 19 October 1992, NJW-RR 199, 567.
[1461] BGH 3 December 1987, *NJW* 1988, 1210, repeated in BGH 12 February 1992, *NJW* 1992, p. 1232, confirming earlier decisions in domestic cases, BGH 20 March 1985, *NJW* 1985, 1838, as well as BGH BGH 7 June 1978, *NJW* 1978, 2243 with further references.
[1462] BGH 20 March 1985, *NJW* 1985, 1838, as well as BGH 24 October 2000, *NJW-RR* 2001, 484.
[1463] Rejecting this option BGH 5 May 1982, *NJW* 1982, 1751 referring to previous case law.
[1464] BGH 28 June 1990, *NJW-RR* 1991, 357.

In international cases, the BGH has frequently taken into account foreign judgments, CJEU case law and international business practices, while it adopts a stricter approach in domestic cases.

10.3.3.2.3. Adequately making STC's available

The question whether STC's have been made available may be decided under various regimes. This paragraph will consider the decisions under Brussels I or the Lugano Convention, as well as the CISG and German law, and compare these decisions with decisions in domestic cases.

Under article 17 Lugano Convention, the BGH[1465] has interpreted the requirements for the availability of STC´s strictly, in accordance with CJEU case law.[1466] However, the BGH is also bound to taken into account mandatory national law. In this case, the declaration in the form that the clauses had been read and understood constituted an unfair clause under article 11 par. 15 AGBG (as well as the Annex to Directive 93/13 under q) as it altered the burden of proof, which was however not relevant for the question whether a choice of jurisdiction had been validly established.

In this case, the question arises whether additional national law that is in accordance with a non-binding part of a Directive may be taken into account in the question whether a clause had been validly established under the Regulation. While the BGH extensively refers to CJEU case law, and its own previous decisions, it does not refer to foreign decisions that support its conclusions on this point. Other decisions similarly raise questions with regard to simultaneously applicable sources of private law. The OLG Köln[1467] upheld a clause for arbitration under article 23 Regulation 44/2001, noting that colliding clauses similarly opted for arbitration, referring to the rules on colliding clauses in the CISG that was applicable in this case, and left the question which clause had been validly included in the contract open. The LG Aachen[1468] followed previous BGH decisions and the decision of the OLG Köln, and held that a choice for jurisdiction had not been validly established.

However, questions on the simultaneous application of European measures and international measures should preferably be resolved by the CJEU, which is well-placed to do this because of its competence and because of its ability to prevent that national courts will come to diverging decisions throughout the Union. More generally, it is desirable that the CJEU develops a clear line on the relation between European measures on private international law and the material private law *acquis*.

Under the CISG, the BGH[1469] has expressly pointed to diverging practices and diverging clauses that may be usual within branches, which may make it more difficult for the offeree to gain access to these clauses. This, in turn, may entail that an offeror should send the text of the STC's used by him to the offeree, or make the text otherwise available, which is in accordance with duties of cooperation of potential contract parties and which may also prevent undue delay in transactions. Schmidt-Kessel[1470] has criticised this decision, as he finds that the BGH has consciously set stricter standards for making available the text of STC's than is the case under German law that for businesses merely requires the possibility to inform oneself of the STC's. He also disapproves of the attempt if the BGH to develop the

[1465] BGH 28 March 1996, *NJW* 1996, 1819, also BGH 22 February 2001, *NJW* 2001, 1731.
[1466] CJEU 14 december 1976 (Colzani/Rüwa), Case 24-76, [1976] ECR, p. 1831 (referred to the CJEU by the BGH).
[1467] OLG Köln 24 May 2006, 16 W 25/06, http://www.cisg-online.ch/cisg/urteile/1232.pdf.
[1468] LG Aachen 22 June 2010, *BeckRS* 2010, 15502.
[1469] BGH 31 October 2001, *NJW* 2002, 370. Accordingly, OLG Koblenz 1 March 2010, 2 U 816/09, http://www.globalsaleslaw.com/content/api/cisg/urteile/2126.pdf.
[1470] M. Schmidt-Kessel, 'Einbeziehung von Allgemeinen Geschäftsbedingungen unter UN-Kaufrecht', *NJW* 2002, p. 3445.

law in accordance with consumer protection law. Although the BGH did not refer to Directive 93/13, it did find that in the interest of the responsiveness of the law to legal practice, as well as to prevent a disadvantaging of contract parties not acting in a professional capacity, it was necessary to ensure that similar principles underlie the law with regard to the inclusion of STC's, either under the CISG or under articles 305-310 BGB. The CISG is not part of the *acquis* and has not been developed to improve consumer protection – article 2 CISG expressly excludes contracts with consumers from its scope, and it is hardly self-evident that the CISG should be interpreted in accordance with national consumer protection law.

Moreover, developing the law implementing Directive 93/13 in accordance with the CISG should be left to the CJEU, as it concerns overlaps between the *acquis* and a treaty. Moreover, as Schmidt-Kessel[1471] points out, the BGH interpretation has not taken into account diverging foreign case law and is difficult to reconcile with the use of well-established international model contracts and clauses.

However, the desirability of this course may become clearer from a previous decision of the LG Düsseldorf,[1472] where a Danish buyer had acquired a generator from a German seller that had included a choice for German law in its STC's. Without asking whether the case fell within the scope of the Directive – which had not been implemented yet but entered into force on 1 January 1995 – the LG held that the clause did not exclude the application of the CISG, although article 2 clearly excludes the sale of goods for personal use from the CISG. Referring this case to the CJEU could however have provided insight on the delineation of the CISG and the Directive.

The BGH has been lenient on the valid inclusion of clauses in international contracts under German law. Under German law, requirements to make available STC's are less strict for business contracts than for consumer contracts, as article 310 par. 1 BGB makes clear that the requirements in article 305 par. 2 and 3 BGB are not applicable to business contracts.

The BGH has referred to parties´ intentions and business practices in determining whether clauses have validly been included. In 1971, the BGH[1473] already held that referral to STC's sufficed as it made clear that the user of STC's wished to include them in the contract, while the question whether it was usual to send the text of STC's to business partners was considered irrelevant as the contract involved a service that the German bank's STC's were clearly designed to cover. In a later case the BGH[1474] decided that STC's that had been drafted in such small print that they were practically illegible were not validly included in the contract, even though similar clauses were often used in that particular branche, on which the BGH expressly elaborated, as the user of STC's could not reasonable expect that his contract party by taking notice of hardly legible clauses, had agreed upon these terms.

Similarly, the LG Gießen[1475] upheld the inclusion of the Dutch FENEX-clauses by referral to these clauses in an email, while the referral to ADR was upheld, in accordance with BGH case law in domestic cases. The court did however not refer to the applicable Directive 2000-31 on e/commerce.

[1471] M. Schmidt-Kessel, 'Einbeziehung von Allgemeinen Geschäftsbedingungen unter UN-Kaufrecht', *NJW* 2002, p. 3445-3446.
[1472] LG Düsseldorf 11 October 1995, 2 O 506/94, at http://www.unilex.info/case.cfm?id=234. The OLG Düsseldorf 25 February 2004, I-15 U 88/03, at http://www.cisg-online.ch/cisg/urteile/915.pdf expressly followed the 2001 decision of the BGH, extensively citing its previous decision of 15 February 2001, 6 U 86/00, upheld by the BGH.
[1473] BGH 18 June 1971, *NJW* 1971, 2126.
[1474] BGH 30 May 1983, *NJW* 1983, 2772. Similarly, OLG Hamm 20 November 1987, *NJW-RR* 1988, 944, in a domestic case, held that STC's should be legible.
[1475] LG Gießen 31 July 2008, *BeckRS* 2009, 395.

Article 10 par. 3 Directive e-commerce sets higher standards for making STC's sufficiently available. However, article 312g BGB that implements these requirements, was not considered. Should the court should have applied the Directive of its own motion? This seems contrary to the needs of legal preference and may also lead to surprises for contract parties that have relied on the applicability of STC's. Also, article 312g par. 5 BGB stipulates, in accordance with article 10 par. 1 Directive, that business contracting with one another may agree otherwise. It is however unclear whether parties can agree otherwise implicitly, by accepting mere referral to a website, or whether they have to expressly agree that referral to well-established STC's is sufficient. The latter conclusion seems undesirable, as this could entail that the establishment of a Directive meant to further online trade would inhibit trade and pose requirements contrary to the needs of trade.

In contrast, in domestic cases, the BGH[1476] has adopted a stricter approach. Mere referral to STC's does not suffice, as inclusion requires explicit or implicit agreement.

It may be concluded that the BGH frequently takes into account relevant decisions from the CJEU. Courts deciding cases under German law also seek to take into account the needs of international practice by taking a lenient approach to requirements of making STC's sufficiently available. In contrast, the BGH has adopted a stricter approach for determining this under international regimes, which may lead to inconsistencies with the decisions of foreign courts and be difficult to reconcile with the use of international model STC's. Its restraint in referring questions on the overlap between European measures to the CJEU may however undermine consistency throughout the Union, despite existing CJEU case law. In turn, this may diminish predictability, as the expectations of private parties relying on CJEU case law may be undermined.

10.3.3.2.4. The interpretation of clauses in international contracts

Typically, the interpretation of international contracts takes place in accordance with the applicable regime. Thus, the question of applicable law precedes the interpretation of STC's. However, if a clause has a well-established meaning in international legal practice – which will especially the case for clauses often-used in international practice – the courts may take that international meaning as a starting point.[1477] In the interpretation of clauses in international contracts, courts may accordingly refer to international sources.

Already in 1967, the BGH[1478] had already held that the insurance conditions agreed upon by parties had a distinct meaning in international trade and should be interpreted accordingly. The BGH went on to consider that the meaning of these clauses in international differed from German law and referred to English law.

Similarly, a 1984 decision of the BGH[1479] also referred to the usual meaning of 'cash on delivery' clauses, referring to its own previous case law in domestic cases as well as international materials. In a 1986 decision, the BGH[1480] similarly held that the interpretation of an English clause required that the court evaluated the meaning of the clause for contract parties taking into account practices established in international trade. Similarly, In a 1991 case, the BGH[1481] held that generally, an indemnity clause was to be interpreted in accordance with English law, even though the circumstances did not indicate that English law was applicable.

[1476] BGH 12 February 1992, *NJW* 1992, 1232, previously also BGH 3 July 1981, *BeckRS* 1981, 31065460.
[1477] Maidl 2000, p. 150.
[1478] BGH 13 November 1967, *BeckRS* 1967, 3037507.
[1479] BGH 19 September 1984, *NJW* 1985, 550, comp. also BGH 2 July 1984, *NJW* 1985, 550.
[1480] BGH 16 October 1986, *NJW* 1987, 591.
[1481] BGH 2 December 1991, *NJW-RR* 1992, 423.

Recently, the BGH[1482] held that the interpretation of a term drafted by the ICC should be interpreted in accordance with the directions from the ICC, in accordance with article 8 CISG, as the term had a well-established meaning that parties were likely to be familiar with when entering into the contracts. The BGH referred both to foreign and European decisions on this point.

The BGH has also taken into account parties' intentions. Accordingly, the BGH[1483] has accordingly held that the use of the clause referring to '*deadfreight*' did not stand in the way of the applicability of article 588 HGB as parties had obviously intended this, although '*deadfreight*' usually had a different meaning than '*Fautfracht*' in articles 580 et seq HGB.

Lower courts have followed the BGH's referral to international and foreign materials.[1484] Earlier, the OLG München[1485] had already explicitly referred to Incoterms in its interpretation of the terms agreed upon between parties. The OLG Hamm[1486] upheld a clause stipulating that all additional agreements to the contract should be written under articles 29 par. 2 CISG. The OLG Hamm[1487] also held that determining the palce of delivery should be determined in accordance with applicable European law as well as the directions from the ICC the clauses of which were applied to the contract.

Interestingly, the approach towards the interpretation of English clauses differs from the interpretation of these clauses in international contracts by the English judiciary that adopt a more neutral approach to the interpretation of clauses in foreign languages.[1488] Dutch judges have also adopted a different approach, an interpret clauses in accordance with Dutch concepts.[1489] Triebel and Balthasar[1490] have pointed out that this approach towards the interpretation of clauses in foreign languages is difficult to reconcile with articles 133 and 157 BGB, as parties unfamiliar with English law will generally not intend to refer to a concept as it has been developed in English law, while the use of English in the drafting of the contract does not necessarily amount to a choice for English law.

The BGH[1491] has distinguished between international and domestic contracts in the interpretation of clauses, and rejected referral to international guidelines to determine whether an exclusion clause in a domestic contract was acceptable, while distinguishing the duties of banks in international and domestic contracts. In the interpretation of domestic contracts, the courts have taken the objective interpretation of STC's as a starting point. Thus, STC's are interpreted in accordance with the intentions of rational and reasonable contract parties, taking into account the interests typically involved in transactions where the STC's are applied.[1492] The individual circumstances are not taken as a starting point.[1493]

German courts have frequently interacted with foreign courts and the CJEU in the interpretation of clauses in international contracts, which increases the chance that these

[1482] BGH 7 November 2012, *BeckRS* 2012, 24430, comp. also BGH 22 April 2009, *NJW* 2009, 2606.
[1483] BGH 4 December 1989, *NJW* 1990, 2257.
[1484] See however Amtsgericht Duisburg 13 April 2000, 49 C 502/00, http://www.unilex.info/case.cfm?id=715 that is more in line with national law. in an international case decided under the CISG, the court held that two deliveries did not constitute established business practices between parties within the meaning of article 9 CISG, which is reminiscent of BGH 12 February 1992, *NJW* 1992, 1232, a domestic decision.
[1485] OLG München 19 December 1957, *NJW* 1958, 426.
[1486] OLG Hamm 31 November 2010, I-19 U 147/09, http://www.globalsaleslaw.org/content/api/cisg/urteile/2291.pdf.
[1487] OLG Hamm 9 September 2011, *BeckRS* 2012, 1173.
[1488] V. Triebel, S. Balthasar, 'Auslegung englischer Vertragstexte unter deutschem Vertragsstatut - Fallstricke des Art. 32 I Nr. 1 EGBGB', *NJW* 2004, p. 2193.
[1489] Rb. Haarlem 11 May 1993, *NJ* 1993, 71.
[1490] Triebel & Balthasar 2004, p. 2193-2194.
[1491] BGH 26 September 1989, *NJW* 1990, 225. Comp. however BGH 6 July 1995, *NJW* 1995, 2991 where the BGH extensively referred to case law and held that applying an exclusion clause to the employee of the user of the STC's was customary – and therefore not unduly surprising – also in international regimes.
[1492] BGH 19 January 2005, *NJW* 2005, 1183. .
[1493] BGH 10 July 1990, *NJW* 1990, 2383.

clauses will be interpreted consistently in different states, which may also benefit accessibility and predictability. Moreover, the approach of German courts also takes into account well-established clauses drafted by non-state actors as well as the intention of parties, which increases the chance that German decisions are in accordance with the needs and preferences of international practice.

10.3.3.2.5. Conclusion on the interpretation of international contracts

The approach of German courts to international cases differs depending on the question whether it concerns a case under German law or international law. Courts are more inclined to refer to foreign materials and international business practices in cases falling under German law. The interaction between courts and foreign and international actors contributes to the responsiveness of the law to international practice. The active approach of the courts may compensate for the restraint of the German legislator with regard to regulatory competition. However, as case law is less visible in international trade than legislation, the extent to which courts may compensate for the legislator's restraint remains limited.

Since the courts clearly recognise the added value of international and foreign materials in these cases, it is surprising that the courts have simultaneously adopted restraint in referring to foreign and international materials in cases falling under international regimes. In these cases, there are more, and not less, reasons for referring to these materials. Particularly, the lack of referral may diminish the consistent and predictable interpretation of treaties. Especially if treaties such as the CISG indicate that they should be interpreted uniformly, the lack of referral to international materials and foreign decisions may be contrary to especially foreign parties' expectations.

However, German courts have adopted a more lenient approach in international cases than in domestic cases, which may be in accordance with the needs and preferences of parties in international trade. Yet this development simultaneously increases the chance that the law on international B2B contracts is developed differently from domestic B2B and B2C contracts, which may increase the chance of inconsistencies, despite the German legislator's choice to extend the scope of Directive 93/13.

The inclination of German courts to refer to German materials may mroeover inhibit accessibility for foreign parties as these parties may not have access to German materials. In some cases, the lack of interaction may lead to problems. In particular, the restraint of the BGH in referring questions on the overlap between treaties and European measures may undermine consistency and accessibility, as the relation between different measures remains undecided by the CJEU.

10.3.3.3. Conclusion on the development of German law and international trade

Have German actors interacted adequately with international actors, European actors and non-state actors in the development of the law on STC's in an international context and how has that affected the predictability, accessibility, consistency and responsiveness of the law on STC's?

Whereas the German legislator has shown restraint in interacting with international actors, particularly with regard to regulatory competition, German courts have considered initiatives and preferences from international actors. The lack of interaction between the BGH, largely followed by lower courts, and the CJEU, especially with regard to cases on the

overlap between European measures, German law and international law may leave room for inconsistency and unpredictability, but German courts seem consistent in their restraint.

The attention fo German courts to international initiatives and practices has benefitted the responsiveness of the German law on STC's to international trade and to national views on justice, but German case law is generally not very accessible for international or foreign parties.

10.3.4. Conclusion on the development of the law on STC's through the BGB

Have German actors adequately taken into account interdependence in the development of the law on STC's, and interacted accordingly, and how has this affected the predictability, consistency, accessibility and responsiveness of the law developed through the BGB?

Firstly, the use of codification and previously the choice to develop *Sonderprivatrecht* was not based on foreign experiences or European initiatives and has not been reconsidered as the *acquis* developed. The German legislator has not recognised interdependence in ensuring the predictability, accessibility, consistency and responsiveness through the BGB, but German actors have actively interacted with European actors in the development of the acquis, which limits the exent to which the *acquis* disturbs the BGB. The lack of interaction in the implementation and application in the *acquis* may however undermine the comprehensibility of the law in the long term.

The German legislator has rejected regulatory competition for the law on STC's, but this has not undermined the quality of the law in terms of predictability, accessibility, consistency or responsiveness. In contrast, the private drafts for regulatory competition might well undermine the quality of the law. The restraint of the German legislator does however not mean that it has not recognised the added value of comparative law insights or that the law is not in accordance with the needs of international practice. The referral of courts in international cases under German law may further contribute to the responsiveness of the law on STC's to international practice.

In contrast, the restraint of courts in international cases under international regimes may undermine the predictability, accessibility, consistency and responsiveness of the law.

10.4. Blanket clauses

In the area of STC's, overlapping blanket clauses coexist, notably article 3 Directive, implemented by article 307 BGB, which however diverges slightly from article 3 par. 1 Directive,[1494] as well as article 242 BGB. Have actors taken into account that other actors also develop private law and that the extent to which actors may ensure the predictable, consistent, accessible and responsive development of the law through blanket clayses may be diminished? Have actors interacted with other actors accordingly and how has this affected the predictability, consistency, accessibility and the responsiveness of private law in this area?

Paragraph 10.4.1. will ask whether German and European courts have recognised the competence of courts at the European and national level to interpret article 307 BGB and interacted accordingly. Paragraph 10.4.2. will turn to model lists and paragraph 10.4.3. will consider the evaluation of clauses in international contracts. Paragraph 10.4.4. will end with a conclusion.

10.4.1. Competence to interpret blanket clauses

It is not clear how the competence to interpret article 3 Directive 93/13 is divided between the CJEU and national courts. Paragraph 10.4.1.1. will consider CJEU case law on this question and paragraph 10.4.1.2. will contrast these decisions with BGH case law. Paragraph 10.4.1.3. will end with a conclusion.

10.4.1.1. The CJEU on the competence to interpret article 3 Directive 93/13

The CJEU is competent to interpret European law under article 267 TFEU. National courts do not have to refer to the CJEU if it concerns an *acte clair*: if the interpretation of a blanket clause is so obvious that it does not have to be referred to the CJEU.[1495] However, this concerns the uniform interpretation of European law. Is article 3 Directive also meant to be interpreted uniformly? In *Freiburger Kommunalbauten*, the CJEU ruled that:

> 'the Court may interpret general criteria used by the Community legislature in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question'

The CJEU expressly refers to the conclusion of A.G. Geelhoed,[1496] who finds that although the CJEU is competent to interpret article 3 Directive, the CJEU is not competent to interpret contractual terms and assess the circumstances relevant for deciding whether a clause is in fact unfair. He goes on to defend that article 3 is not intended to be interpreted uniformly. Although the CJEU does not refer to that particular part of his conclusions, this conclusion does not seem irreconcilable with the wording of article 1 Directive that states that it is the aim of the Directive to approximate – not unify – the law of Member States on this point.

[1494] MunchKomm zum BGB/Wurmnest (2012) article 307 nr 24.
[1495] CJEU6 October 1982 (CILFIT v Ministry of Health), Case 283/81, [1982] ECR, p. 3415.
[1496] Opinion of A.G. Geelhoed before case C- C-237/02, ECR [2004] 3403, pars. 25 et seq.

However, later case law may draw this conclusion into doubt. In *Océano*,[1497] the CJEU did not restrain from deciding that a jurisdiction clause in a consumer contract was unfair. A.-G. Trstenjak, in her conclusion before *Pénzügyi Lízing*[1498] explicitly refers to the conclusion of A.-G. Geelhoed in this matter, finding that subsequent case law supported A.-G. Geelhoed's view that the judicial evaluation of clauses in consumer contacts should be decentralised. She specifically points to the relevance of national law and individual circumstances to determine the fairness of a clause, and she concludes that:

> 'the guidelines on assessment given in those judgments cannot in any way be regarded as definitive. They are just some of the 'general criteria' within the meaning of the case-law which the Court can provide to the national court under its monopoly on the interpretation of Community law. The specification of what constitutes unfairness under Article 3(1) of the Directive at the level of Community law must ultimately be construed as an ongoing process the end point of which it is for the Court to determine. It must be the task of the Court gradually to give specific expression to the abstract criteria for reviewing whether a term may be classified as unfair and, with increasing experience, to establish a profile for reviewing the unfairness of terms at the level of Community law.'

Perhaps, the wording of the decision in *Freiburger Kommunalbauten* leaves open the possibility that the CJEU ruled that it is competent to provide abstract criteria to interpret article 3, while it was left to national judges to determine whether a clause was *in fact* unfair, in other words: a *factual* decision.[1499]

This view is supported by the wording in more recent case law, where the CJEU[1500] has held that '[i]t is thus clear that the Court of Justice must limit itself, in its response, to providing the referring court with the indications which the latter must take into account in order to assess whether the term at issue is unfair'. Accordingly, the CJEU refers to the Annex to the Directive, and the reasons for and methods of including a term that is potentially unfair, as well as the clarity of that term.

In other cases, the CJEU has also provided further guidelines relevant for the assessment of the fairness of clauses. Thus, in *Pereničová and Perenič/SOS financ spol. s r.o.*,[1501] the CJEU held that the unfairness of a commercial practice could be a relevant circumstance for the interpretation of unfairness under article 4 Directive. In *Pohotovosť s.r.o./Korčkovská*,[1502] the CJEU, referring to *Freiburger Kommunalbauten*, pointed to the Annex to the Directive and the consequences of clauses under the applicable law. In *Pannon/Győrfi*,[1503] the CJEU decided that it is for the national court to assess the fairness of a clause in fact, taking into account that a term conferring exclusive jurisdiction to the court in the place of residence of the seller (a clause that was found to be unfair in *Océano*[1504]) 'may be considered to be unfair'. This view has moreover recently been confirmed in *Aziz v Catalunyacaixa*,[1505] where the CJEU repeated that it establishes general criteria that national courts must or may consider in the factual assessment of clauses. Thus, the CJEU provides

[1497] CJEU 27 June 2000 (Océano Grupo/ Quintero), joined cases C-240/98 to C-244/98, [2000] ECR, p. I-4941.
[1498] Conclusion of A.G. Trstenjak of 6 July 2010 before case C-137/08 (VB Pénzügyi Lízing/ Schneider), [2010] ECR p. I-0, pars. 96-97, 99.
[1499] Also in this sense J. Hijma, *Algemene voorwaarden*, Kluwer: Deventer 2010, p. 25-26.
[1500] CJEU 26 April 2012 (Hatóság/Invitel), C-472/10, ECR [2012], p. I-0, par. 22, similarly CJEU 9 November 2010, (VB Pénzügyi Lízing/ Schneider), C-137/08 , [2010] ECR p. I-0, par. 44.
[1501] CJEU 15 March 2012 (Pereničová and Perenič/SOS financ spol. s r.o.), C-453/10, [2012] ECR, p. I-0, par. 43.
[1502] CJEU 16 November 2010 (Pohotovosť s.r.o./Korčkovská), C-76/10, [2010] ECR, p. I-0, par. 58, 60.
[1503] CJEU 4 June 2009, (Pannon/Győrfi), C-243/08, ECR [2009], p. I-4713, par. 44.
[1504] CJEU 7 June 2000 (Océano/ Quintero), joined cases C-240/98 to C-244/98, [2000] ECR, p. I-4941.
[1505] CJEU 14 March 2014 (Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)), C-415/11, [2013] ECR, p. I-0.

guidance. In this case, the CJEU points to the relevance of national law that would have been applicable in the absence of the agreement, to compare the position of the consumer under the clause with the position of the consumer under national law. If the position of the consumer is decidedly less advantageous, this is an indication that the clause is to the detriment of the consumer – whether this is unfairly so, may be another question, answered in line with the criteria of article 4 Directive 93/13.

In addition, according to Basedow,[1506] general principles may also play a role in the interpretation of blanket clauses by the CJEU.

The European view on the allocation between the CJEU and the national courts in the interpretation of article 307 BGB leaves room for unclarity. Although initially, the CJEU seemed to leave considerable room to national courts, later CJEU case law may indicate a more active role for the CJEU in the interpretation of article 3 Directive. Thus, the question whether the CJEU is competent to provide guidelines for the interpretation of provisions implementing article 3 Directive 93/13 and how that affects the competence of national courts has not been clearly decided by the CJEU. Thus, this question is not an *acte éclairé*.[1507] The question whether the CJEU is competent to interpret or provide guidelines on article 3 Directive has as such not been asked before; the question in *Freiburger Kommunalbauten* was whether a specific clause was unfair in the meaning of the Directive. As the Directive indicates that this requires an individual rather than an abstract evaluation of the fairness of a clause, the factual evaluation remains with national courts. National courts accordingly have to refer questions on the allocation of competence in the interpretation of blanket clauses.

This does not mean that the CJEU will necessarily declare itself competent. National courts may well have decided cases in which the interpreted and applied article 307 BGB correctly. The problems is that this question has not yet been decided by the CJEU.

Quite another question is whether it is desirable for the CJEU to have competence to provide guidelines for the interpretation of article 307 BGB. Guidelines have alreayd been well-established at the national level, and CJEU guidelines may be different, which could undermine the consistency of the law. Moreover, the CJEU does not provide consistent guidelines for the development of the *acquis*; instead, the allocation of competences and the guidelines may differ depending on the Directive.

10.4.1.2. The BGH and the interpretation of article 307 BGB

Initially, the BGH[1508] followed the view that article 307 BGB goes beyond the standard of article 3 par. 1 Directive, in accordance with the minimum harmonisation character of the Directive, and consequently, national courts are competent and referral is not necessary.[1509] The BGH ruled that it would not refer to the CJEU as the question whether clauses are fair or unfair within the meaning of articles 9-11 AGBG is a matter for the German judiciary that the CJEU is not competent to determine. In contrast, the BGH later referred questions on the interpretation of article 307 BGB in *Freiburger Kommunalbauten* to the CJEU,[1510] concerning a clause in a building contract that provided the respondents with a surety, in accordance with article 7 of the regulation on real estate agents and builders ('*Makler- und Bauträgerverordnung*'). The BGH considered that it was doubtful whether the clause was

[1506] MunchKomm zum BGB/Basedow (2012) article 307 nr 26.
[1507] CJEU 26 March 1963 (Da Costa v Netherlands Inland Revenue Administration), Joined cases 28 to 30-62, [1963] ECR, p. 31.
[1508] BGH 7 July 1998, *BeckRS* 1998, 30018428.
[1509] MunchKomm zum BGB/Basedow (2012) introduction to articles 305-310 BGB, nr 34.
[1510] BGH 2 May 2002, *NZM* 2002, 764. The annotation of G. Basty to the decision under *DnotZ* 1999, 482 further explains the practical relevance of these clauses.

unfair, as it was compensated by another clause to the benefit of the consumers. However, as the clause could, in the different legal orders, be considered unfair, and was therefore referred to the CJEU. The decision of the BGH in *Freiburger Kommunalbauten*[1511] is in accordance with the view that although article 307 BGB provides more protection to the consumer than article 3 Directive, referral need not be made when clauses are found to be unfair, but in cases where a clause is upheld, the case should be referred to the CJEU, as the minimum standard should be complied with, which may become relevant in these cases.[1512]

The BGH[1513] subsequently cited *Freiburger Kommunalbauten*[1514] to confirm its own competence to interpret article 307 BGB and evaluate the fairness of clauses under article 307 BGB in cases falling within the scope of the Directive. Accordingly, since *Freiburger Kommunalbauten*, the BGH has interpreted article 307 BGB and evaluated clauses under this provision without referring questions to the CJEU, taking into account CJEU case law, Directive 93/13, or foreign case law.[1515] However, the CJEU has not provided a conclusive answer and it therefore does not concern an *acte éclairé*. The controversy on this question in German debate[1516] also indicates that it is hardly a settled question that can easily be deduced from existing CJEU case law. Lower courts largely follow BGH case law, although some lower courts have referred to the Directive in the interpretation of article 307 BGB. [1517]

However, in a 2011 decision, the BGH[1518] did consider the competence of the CJEU to interpret the Directive, specifically article 1 par. 2 Directive, implemented in article 307 par. 3 BGB. The BGH asked the CJEU whether a term for the unilateral amendment of prices in contracts for the supply of gas should be evaluated under the Directive, as the terms reflected legislative provisions applicable to similar contracts for the supply of gas. The CJEU[1519] held that if the legislature has chosen to exempt particular contracts from legislation that would otherwise prevent the evaluation of clauses in accordance with article 307 par. 3 BGB, parties cannot circumvent evaluation under article 307 BGB by reflecting the provisions of law that is not applicable. To determine the fairness of the term, the question whether consumers could foresee changes when they entered into the contract and realistically terminate the contract was important.

[1511] BGH 2 May 2002, *NZM* 2002, 764.
[1512] P. Ulmer, 'Der AGB-Gesetz nach der Umsetzung der EG-Richtlinie über miβbräuchliche Klauseln in Verbraucherverträgen', in: Karlsruher Reform 1998, p. 38.
[1513] BGH 14 July 2004, *BeckRS* 2004, 07903, par. II, 3, see similarly, with an overview of case law, F. Graf von Westphalen, 'AGB-Recht im Jahre 2004', *NJW* 2005, p. 1987.
[1514] CJEU 1 April 2004 (Freiburger Kommunalbauten v Hofstetter), C- 237/02, [2004], ECR, p. I-3403.
[1515] See for example recently BGH 22 May 2012, BeckRS 2012, 15087, referring however to Directive 2007/65 on payment services and its predecessor, BGH 8 May 2012, BeckRS 2012, 14567 and BGH 8 May 2012, *NJW* 2012, 2337 (two similar decisions, also referring to the contra preferentem interpretation of terms and the interpretation to the detriment of the consumer that is the starting point for the evaluation of the clause under article 307-309 BGB), BGH 17 April 2012, *BeckRS* 2012, 11675, BGH 20 March 2012, *BeckRS* 2012, 10736, BGH 14 March 2012, *BeckRS* 2012, 8786, BGH 9 December 2010, *NJW* 2011, 1347, as well as BGH 5 December 2006, *NJW* 2007, 997, on the question whether a clause that need in itself not be unfair is unfair in combination with other clauses, or earlier, BGH 13 February 2001, *NJW* 2001, 1419, in which the BGH emphasised the main duties of contract parties and the inadmissibility of charging an extra fee for those duties.
[1516] MunchKomm zum BGB/Basedow (2012) article 307 nr 25, with further references.
[1517] OLG München 9 October 2003, *NJW-RR* 2004, 212 (the decision has not become binding) noted that in the evaluation of clauses, the court should take into account surrounding clauses, as stipulated in article 4 Directive. OLG Stuttgart 3 december 2009, *BeckRS* 2009, 88415 upheld a clause that stipulated a tariff that was owed to the bank when the credit contract ('*Bausparvertrag*') was concluded constituted a clause on the price that fell under the main terms of the contract, referring to the preamble of the Directive. However, the clause endured judicial evaluation under article 307 BGB, and followed BGH case law. OLG Frankfurt 15 April 2010, *BeckRS* 2010, 14553 held that a clause that limited the validity of tickets did not cause a significant imbalance in parties' rights and obligations in the sense of article 3 Directive, as implemented by article 307 BGB, and upheld the clause accordingly.
[1518] BGH 9 February 2011, *NJW* 2011, 1392.
[1519] CJEU 31 March 2013 (RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen), C-92/11, [2013] ECR, p. I0.

Interestingly, the change of the approach of the BGH in this matter was preceded by a prejudicial question from the OLG Oldenburg.[1520] Moreover, terms reserving the right for the suppliers of gas to unilaterally amend their prices were increasingly challenged by consumers. The CJEU decision does however render previous BGH decisions on this point uncertain.[1521]

This does not mean that German decisions are not in accordance with the Directive,[1522] but the interpretation of article 307 BGB is currently oriented at national law,[1523] which may differ from the standard established in article 3 Directive in several respects:

1) The evaluation of the BGH may go beyond the standard of protection in the Directive.

The BGH[1524] has ruled that clauses that do not allow contract parties bound to STC's to assess their rights and obligations under the contract, such as amendment clauses that make it impossible for the consumer to foresee under what circumstances and to what extent additional payment will be required, are unfair. Possibly, this goes beyond the standard of article 3 par. 1 Directive that stipulates that a term shall be unfair if it results in a 'significant imbalance in the parties' rights and obligations' that is contrary to good faith.

However, this interpretation is in line with the decision of the CJEU in Invitel,[1525] that the clarity of terms is 'of fundamental importance' under article 4 Directive. Arguably, the clarity of terms is important, but from subsequent case law it follows that this is not the only relevant circumstance, and the question arises whether it can be deduced from the wording of the CJEU that the clarity of a contract term should be decisive.

The outcomes in these cases are not necessarily problematic as this stricter standard leads to a higher level of consumer protection, in accordance with the minimum harmonisation character of the Directive.

2) Constitutional law may become relevant in the assessment of the fairness of terms.[1526] It can be doubted, despite the existence of the Charter, whether this will similarly be the case for the assessment of terms under the Directive.

3) The BGH evaluates clauses in a more objective manner than indicated in the Directive and in CJEU case law.[1527]

The unclarity on the division of competences between the CJEU and national courts does not in fact mean that the CJEU will conclude, if a question is referred, that it is competent to

[1520] OLG Oldenburg 14 December 2010, *BeckRS* 2011, 8627.
[1521] L. Zabel, 'Die Anforderungen an Preisanpassungsklauseln in Gas- und Fernwärmelieferverträgen', *KommJur* 2011, p. 269.
[1522] Comp. OLG Bamberg 19 October 2011, *BeckRS* 2011, 28303 that held a clause that was contrary to the duties following from Directive 2007/64 as ineffective under article 307 BGB, holding that previous case law of the BGH was outdated. OLG München 17 January 2008, *NJW-R*R 2008, 1233 held that a clause that limited the validity of a gift coupon to a year was ineffective under article 307 BGB, referring to national law and case law of the BGH and lower courts. OLG Bamberg 26 June 2012, *NJW* 2012, 2282 holding a clause that sought to affect consumers' choice for a lawyer ineffective, recognising the need for competition and the constitutional free choice of a lawyer, is very likely also in accordance with the Directive. OLG Koblenz 13 June 2012, *BeckRS* 2012, 12430, holding that a clause that excluded the consumer's right to assignment would be ineffective under article 307 BGB is in accordance with the Annex to the Directive that includes clauses that inappropriately limit consumers' rights towards the supplier who has breached the contract under sub b. OLG Stuttgart 24 May 2012, *BeckRS* 2012, 11663 rejecting a clause that enabled an English insurer to limit the value of the claim of the policy holder that had terminated the contract is likely also in accordance with the Directive, as the clause may fall under either sub d or sub e of the Annex. Despite the abundance of case law on this topic, very few cases that may be problematic under the Directive become apparent.
[1523] The standard used in the evaluation of STC's under article 307 BGB can be traced to BGH 11 June 1979, *NJW* 1979, 1886.
[1524] BGH 19 October 1999, *NJW* 2000, 651.
[1525] CJEU 26 April 2012 (Hatóság/Invitel), C-472/10, [2012] ECR, p. I-0, par. 28.
[1526] Comp. BverfG 25 October 2004, *NJW* 2005, 1036, BverfG 23 November 2006, *NJW* 2007, 286.
[1527] Baier 2004, p. 86-87.

interpret article 3 Directive. The minimum harmonisation character of the Directive may be a reason for the CJEU to allow for discretion at the national level.

Also, it is also not desirable that courts would have to start referring all its cases to the CJEU. The need to refer frequently to the CJEU would undermine the protection offered by national courts, and increase the amount of time necessary to decide a case, as referral to the CJEU may considerably extend the length of the procedure, which will not benefit consumer protection.[1528] Moreover, article 307 BGB is closely connected with good faith, a fundamental principle in the German legal order.[1529] Reallocating competence to interpret central principles to the European level could drastically affect the consistent and coherent development of German private law. If this decision is made, it should therefore be subject to critical democratic debate.

10.4.1.3. Conclusion on the competence to interpret blanket clauses

Courts at the national and European level have insufficiently recognised the interdependence between courts in interpreting blanket clauses. Because of the lack of interaction, this question has remained invisble in the European debate on the reform of the Directive. However, this question should be addressed in the legislative process, especially as it might concern a considerable reallocation of competences to the European level, which may inhibit consistency as well as responsiveness, as national courts are better placed to interpret blanket clauses in accordance with (national) society's views on justice and national legal practice. As article 3 Directive 93/13 was inserted to improve responsiveness, overlooking the roles of national courts in ensuring responsiveness would be unfortunate.

Meanwhile, it does not become apparent that the lack of interaction directly leads to porblems for private parties, as German courts have ensured the predictable, consistent and responsive development of the law through article 307 BGB. However, it is desirable that the BGH adopts a more consistent, predictable approach to referring questions to the CJEU.

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10.4.2. Model lists

Model lists have been established both by the European and the German legislator. Neither the German[1530] nor the European model list[1531] provides an exhaustive list of unfair clauses – thus, clauses that do not fall within the scope of the list may also be unfair. Generally, model lists should clarify how blanket clauses should be interpreted, thus contributing to consistency and predictability. Does the simultaneous use of model lists undermine predictability, consistency and the accessibility of one or both of these lists, or has interaction added to predictability, consistency and accessibility?

Paragraph 10.4.2.1. will consider the development of the German and European model lists and paragraph 10.4.2.2. will discuss the implementation of the European model list. Paragraph 10.4.2.3. will turn to the application of the model lists by the courts and paragraph 10.4.2.4. will end with a conclusion.

10.4.2.1. The development of the German and European model lists

[1528] P. Ulmer, 'Der AGB-Gesetz nach der Umsetzung der EG-Richtlinie über miβbräuchliche Klauseln in Verbraucherverträgen', in: Karlsruher Reform 1998, p. 38, 39.
[1529] Heiderhoff, *WM* 2003, p. 510 .
[1530] BGH 24 September 1980, *NJW* 1981, 118.
[1531] CJEU 7 May 2002 (Commission/Sweden), C-478/99, [2002] ECR p. I-4147.

The German legislator was one of the first legislators to establish a regime, including black and grey lists, while European harmonisation initiatives had not yet developed. Consequently, the German legislator had less opportunity to draw from the experiences from other legislators in the European Union with regard to the use of black and grey lists. However, international initiatives had developed, and especially the Warsaw Contention was relevant and should have been taken into account.

The German black and grey list are inspired by standing case law on unfair terms that were moreover developed for businesses, which entails that they will also be relevant for B2B contracts.[1532] Ulmer and Habersack[1533] note that the judicial evaluation under article 307 BGB has been sharpened as the effect of the model lists on article 307 BGB have become visible, and as article 307 BGB has been used to fill up gaps in the model lists. Foreign legislators, in a later stage, have looked to the German regime for inspiration.[1534]

Notably, the German legislator initially objected to the use of the model list at a European level,[1535] and the indicative nature of the list in the Annex is attributed to German criticism.[1536] Because of the correlation between model lists and general default law, the use of binding model lists has also been rejected because it could be a back door to a European contract law.[1537]

Originally, the 1990 version of the model list to the Directive was not considered to be of much added value, as it did not provide clear guidance on how to balance parties' right in determining whether a term is unfair under the draft Directive. That does not mean that the model list as such was considered of little value, as it was simultaneously considered that in an amended version, the list could contribute to predictability. [1538]

Thus, the active participation of German actors limited the obligation of the German legislator to amend existing model lists.

10.4.2.2. The implementation of the European model list

Because of the indicative character of the European model list, it was not clear how far the obligation of the German legislator to implement the model list went. Preamble 17 to the Directive, referring to its minimum character, allows Member States to alter the wording of the annex depending on their national law. Preamble 17 also seems to allow for more restrictive drafting.[1539] Yet the non-binding nature of the European list does not mean that Member States are free to ignore the model list, as this may undermine the extent to which the European model list contributes to the predictability of article 3 Directive. The decision of the CJEU in Commission/Sweden[1540] made clear that the model list should be a source of information both for legislators, judiciaries, and contract parties, and consequently, Member States must implement the list in a way 'that offer[s] a sufficient guarantee that the public can obtain knowledge of it'.

[1532] W. Tilman, 'Das AGB-Gesetz und die Einheit des Privatrechts', *ZHR* 1978, p. 58.
[1533] Ulmer/Brandner/Hensen/AGB-Recht/Ulmer/.Habersack (2012) introduction, nr 71.
[1534] For example the Dutch legislator; see par. 11.3.
[1535] BR-Drucks. 611/90, p. 1.
[1536] P. Ulmer, 'Das AGB-Gesetz nach der Umsetzung der EG-Richtlinie über miβbräuchliche Lauseln in Verbraucherverträge', in: Karlsruher Forum 1997, p. 31, 33-34.
[1537] Jansen *ZeuP* 2010, p. 82.
[1538] See for example H.E. Brandner, P. Ulmer, 'EG-Richtlinie über miβbräuchliche Klauseln in Verbraucherverträgen', *BB* 1991, p. 706.
[1539] Grabitz/Hilf/Das Recht der Europäischen Union/Pfeiffer (2012), article 3, nr 89, similarly MunchKomm zum BGB/Wurmnest (2012) article 308, nr 10.
[1540] CJEU 7 May 2002 (Commission/Sweden), C-478/99, [2002] ECR p. I-4147, par. 22.

Moreover, in Grimaldi,[1541] the Court more generally held that even if measures are not binding, this does not mean that they have no legal effect at all, and they should be taken into account by national judiciaries in their decisions. Accordingly, Wolf,[1542] considering the role of the Annex in the clarification of article 3 Directive, has held that divergences from the Annex should be based on good reasons. Graf von Westphalen [1543] finds that the implementation of the model list in German law is insufficient, as the present implementation is not publicly accessible, or publicly known. Similarly, Baier[1544] has held that implementation in German law does not suffice because differently than the Swedish legislator, the German legislator has not made the Annex available for the consumer: 'Für den deutschen Verbraucher existiert die Liste gewissermaβen gar nicht.'

In these views, implementation apparently requires that the model list in the Annex is made separately available to consumers. This would however undermine accessibility, as it may be confusing that two apparently largely similar model lists would be available to indicate whether a list is unfair.

In the implementation of the model list, the German legislator amended articles 308 and 309 BGB, but these provisions do not completely reflect the European model list.

- Some clauses have been inserted after the Directive was established.

Thus, article 309 par. 7 sub a was extended to prohibit the exclusion of damages for death or injury to consumers caused by a fault or omission of the user of STC's.

- Some differences have remained.

In particular, articles 308-309 BGB do not include arbitration clauses, included under 1 sub q in the Annex, while article 309 par. 8 sub b BGB is formulated more narrowly, prohibiting exclusion clauses with regard to the sale of new goods, while the Annex, under 1 sub b, prohibits all exclusion clauses. According to Wurmnest,[1545] this more narrow interpretation should be seen against the trade in secondhand goods that may often show small defects but that are sold for a lower price than new goods. Additionally, articles 308 and 309 BGB do not include an express prohibition on clauses falling under the Annex par. 1 sub d, although these clauses can be held ineffective under articles 308 par. 7, and 309 pars. 5 and 6 BGB. Similarly, articles 308-309 do not expressly prohibit clauses falling under the Annex par. 1 sub f, although these clauses can be challenged under articles 308 pars. 3 and 7, and 309 pars. 5 and 6 BGB. Also, articles 308 and 309 do not directly bar clauses falling under the Annex par. 1 sub g. Moreover, although clauses in the Annex under par. 1 sub m are not expressly prohibited under articles 308 and 309, they will generally affect the right of the consumer to performance, and these clauses will generally fall under article 309 par. 7 BGB. Additionally, articles 308-309 do not expressly prohibit clauses falling under the Annex par. 1 sub q, although these clauses may be challenged under articles 309 nrs 5 and 12, while clauses limiting consumers' right to a fair process will generally be held ineffective under article 307 BGB.

- Furthermore, provisions in the BGB may prohibit clauses under the Annex.[1546]

[1541] CJEU 13 December 1989 (Grimaldi/ Fonds des maladies professionnelles), C-322/88, [1989] ECR, p.-4407, par. 18.
[1542] Wolf/Lindacher/Pfeiffer/AGB-Recht/Wolf (2009) Annex to the Directive, nr 1.
[1543] F. Graf von Westphalen, 'Das Verbot von Nr. 1b des Anhangs zur EG-Klauselrichtlinie 93/13/EWG', *ZGS* 2004, p. 467.
[1544] Baier 2004, p. 77.
[1545] MunchKomm zum BGB/Wurmnest (2012), article 308, nr 11.
[1546] Clauses falling under the Annex par. 1 sub i will generally not be valid as they are in breach of article 305 BGB. Also, clauses falling under par. 1 sub f in rent contracts are prohibited by article 547 par. 2 BGB, while article 551 BGB limits the possibility to stipulate a security for future rent..

Notably, some clauses under the Annex may diverge from default law and can therefore be considered unfair, such as clauses under Annex par. 1 sub n, which diverges from article 164 BGB, while these clauses may also fall under article 309 par. 11 BGB, and clauses stipulating a choice of jurisdiction between a business and a consumer are contrary to article 38 par. 1 ZPO and therefore void.

These divergences do not have to lead to the incorrect implementation of the Directive, but it may be doubted whether the model list has been implemented in such a way that the European model list serves as a source of information.

Pfeiffer and Schinkels[1547] note that the legislator decided not to copy-paste the grey list in the annex to the Directive, despite arguments before the implementation of the Directive that the legislator should consider implementing the list in the Annex to the Directive, especially with regard to clauses in the black and grey list that are stricter than German law, because the CJEU would likely use the black and grey list in its interpretation of article 3 Directive.[1548]

The decision of the German legislator not to implement the Annex to the Directive in German law may be seen against the background of the general restraint of the German legislator to amend the AGBG and the BGB to absolutely necessary amendments.[1549] Moreover, it was not clear whether the German legislator was bound to amend the law for the implementation of the model list in the Annex to the Directive, while articles 308 and 309 BGB already largely reflected the clauses in the Annex. Moreover, the correlation between national default law and the model list may also have played a role in the legislator's unwillingness to amend the law.

Thus, whether interdependence has not clearly developed, but it is possible that the German legislator has not sufficiently recognised the potential importance of the European model list.

10.4.2.3. The aplication of the European model list by the German courts

How have German courts approached the evaluation of clauses that may fall in the scope of the model list in the Annex to the Directive?

Paragraph 10.4.2.3.1. will consider the approach of the BGH, and paragraph 10.4.2.3.2. will turn to the decisions from lower courts. Paragraph 10.4.2.3.3. will end with a conclusion.

10.4.2.3.1. The approach of the BGH towards the European model list

The BGH has not developed a clear approach towards the European model list and has not interacted with the CJEU on the status of this list.

The BGH[1550] has emphasised the CJEU decision in Commission/Sweden where the CJEU ruled on the indicative and illustrative character of the model list in the Annex to the Directive.

The decision of the BGH to uphold an arbitration clause in this case can be seen against the background of a well-established arbitration system that complies with civil procedure law, and the

[1547] Pfeiffer & Schinkels 2001, p. 171.
[1548] K. Frey, 'Wie ändert sich das AGB-Gesetz?', *ZIP* 1993, p. 579.
[1549] BT-Drucks. 13/4699 and 13/2713.
[1550] BGH 13 January 2005, *NJW* 2005, 1125.

undesirability to overturn a well-established practice on the basis of a non-binding model list that moreover refers to arbitration 'not covered by legal provisions'. Notably, these are sufficient reasons to uphold these clauses, and the decision is likely not contrary to the Directive. Nevertheless, the conclusion that the Annex – or rather, the clauses in the Annex not included in articles 308-309 – need not be implemented can hardly be deduced from *Commission/Sweden*.

Nevertheless, further decisions of the BGH do not reveal a consistent approach. In the majority of cases, the BGH does not refer to the Directive, but some decisions have referred to the Directive, while other decisions uphold clauses falling under the European list without referring to the Directive.

The majority of cases does not refer to the Directive or the model list, which does not necessarily mean that these decisions are contrary to the Directive.

These decisions include the decision of the BGH in a case on a clause limiting the possibility of interim cancellation to cancellation with a doctor's declaration specifying because of which health problems clients were not able to attend a sports studio,[1551] as well as the decision on a clause providing that the offer of the seller of a house would be valid for 4 months and 3 weeks,[1552] and a clause limiting the prescription period for actions of the buyer for breach of contract and compensation thereof.[1553] Similarly, a clause for amending the contract, which also falls under Annex under 1 sub j, was held to be ineffective under article 308 par. 4 BGB, as it was insufficiently clear to allow the consumer to calculate future interests,[1554] as well as a decision in which a clause concerning a fictive declaration of inclusion, also falling under the Annex under 1 sub i, was held ineffective under article 308 par. 5 BGB.[1555]

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Cases in which the BGH has referred to the Directive include a recent decision of the where the BGH[1556] referred to the Directive and the Annex to the Directive for the evaluation of a penalty clause.

The BGH ruled that article 309 par. 7 sub a BGB is in accordance with the Directive, as a clause stipulated the all-in exclusion of strict liability is contrary to the principle of good faith in article 3 Directive as it causes a significant imbalance in parties' rights and obligations. A clause that stipulates a disproportionate long period for the user of STC's to perform the contract, thereby excluding the consumers' rights to damages for delay in performing the contract, or the right of the consumer to withdraw from the contract, is similarly unfair. The application of article 4 UWG – implementing Directive 2005/29 – is in accordance with the Directive.

Arguably, this decision of the BGH may indicate that the BGH considers itself competent to provide guidelines for the interpretation of the Directive. If that is the case, the question arises whether this decision adequately takes into account the possible competence of the CJEU to provide such guidelines.

Although the reasoning of the BGH is convincing and probably correct, the interpretation of the BGH is less likely to be followed by foreign courts than the interpretation of the CJEU, if only because the case law from the BGH is less easily accessible for foreign courts, but also because foreign courts may consider penalty clauses less objectionable, or may attach more weight to civil procedure law that stands in the way of the evaluation of clauses.[1557]

[1551] BGH 8 February 2012, *NJW* 2012, 1431.
[1552] BGH 11 June 2010, *NJW* 2010, 2873.
[1553] BGH 15 November 2006, *NJW* 2007, 674.
[1554] BGH 13 April 2010, *NJW* 2010, 1742.
[1555] BGH 11 November 2009, *NJW* 2010, 864.
[1556] BGH 31 May 2012, *GRUR* 2012, 949.
[1557] For example HR 22 June 2007, *NJ* 2007, 344. This decision should however be seen against the background of Dutch law that holds that clauses are avoidable rather than invalid, which entails that judges will not *ex officio* evaluate clauses.

In other cases, the BGH has upheld clauses falling under the European model list, in contrast with the view that cases upholding clauses should be referred to the CJEU as these decisions may go below the minimum standard set by the Directive.[1558]

The BGH[1559] upheld a clause fixing the amount of damages ('*Schadenspauschalierungsklausel*') under article 309 par. 5 sub b BGB. The BGH considered that the clause did not exclude the possibility for the consumer to dispute that there were no damages, in which case the clause would be ineffective – and it would also fall under Annex under 1 sub q.

In another case, the BGH[1560] also upheld a clause setting a period for termination that exceeded the duration of the contract, which was challenged on the basis of articles 307 and 309 under 9 sub b BGB, which also falls under the Annex under 1 sub h.

Arguably, the BGH decisions, and the lack of a consistent approach, is in line with the emphasis on the indicative nature of the list, which may be criticised because:

i) The emphasis on the non-binding status of the list overlooks that the non-binding character of the model list does not mean that state actors are free to ignore the model list if they choose.

ii) The approach of the BGH leaves room for a similar inconsistent approach of lower courts, which may be detrimental for the consistent and predictable use of model lists, and it may limit the extent to which the European model list may contribute to the predictable and consistent interpretation of article 307 BGB.

Notably, however, the approach of the BGH does take into account national practice and national legal views on justice that become apparent from default law. Arguably, it is desirable that the CJEU makes clear that the need to evaluate clauses in a manner consistent with legal practice or legal views on justice should be sufficient justification for diverging from the European model list.

However, because of the lack of interaction between the BGH and the CJEU, questions on the obligation of national legislators and courts to implement and apply the list in the Annex to the Directive may remain subject to doubts, which may eventually undermine the predictable development of the private law *acquis*.

10.4.2.3.2. The approach of lower courts: referring to the Directive

Lower courts have not referred questions on Directive 93/13 to the CJEU, perhaps because this may considerably lengthen the duration of the procedure, while other relevant materials to decide the case are available. Lower courts especially refer to BGH case law, as well as decisions from other lower courts. Courts have not developed a consistent approach to referring to the Directive and the list in the Annex to the Directive, but referral to the Directive is not decisive: some decisions referring to the Directive or other relevant Directives are in line with Directive 93/13, while other decisions not referring to the Directive may also be in line with the Directive. In rare cases, both decisions referring to the Directive and non referring to the Directive are not in accordance with Directive 93/13.

- Many decisions referring to the Directive are in line with Directive 93/13.

[1558] Grabitz/Hilf/Das Recht der Europäischen Union/Pfeiffer (2012), article 3, nr 84.
[1559] BGH 14 April 2010, *NJW* 2010, 2122.
[1560] BGH 15 April 2010, *NJW* 2010, 2942.

Thus, the OLG München[1561] held a clause that allowed the drafter to amend the contract for ineffective as it was contrary to article 308 par. 4 BGB, pointing to established case law of the BGH that underlines that clauses that allow for amending the contract limit the extent to which parties can determine their future rights and obligations under the contract, also referring, in passing, to the Annex to the Directive. The OLG Brandenburg[1562] that held a clause excluding liability, including liability for damages that fell under article 309 par. 7 BGB, caused by reckless or intentionally wrongful behaviour, and, referring to the duty of national courts to interpret national law in accordance with the Directive held that articles 307 et seq BGB was also applicable in this case.

- Some decisions moreover refer to other relevant Directives.

LG Frankfurt[1563] held that a clause that stipulated that statements of accounts would be sent to the consumer, for payment, unless he rejected this within 30 days was held ineffective. The court, following the case law of the BGH, did not refer to the Directive, but held that article 248 EGBGB imposed information duties on the bank, as well as article 675d BGB, which should respectively be seen against the background of a treaty and a the Directive on payment services. The LG Hamburg[1564] held that a clause that required the consumer to inform the seller of defects was contrary to article5 par. 2 Directive 99/44 on consumer sales, and was contrary to article 309 par. 5 sub b under ee. The OLG Düsseldorf,[1565] in a case that also fell under Directive 85/577, held a clause that declared that the consumer had negotiated prior to the visit of the salesman and agreed with the offer unfair under article 309 par. 12 BGB, referring to BGH case law as well as a previous decision from a lower court. Alternatively, the OLG München,[1566] although not referring to the Directive, held clauses imposing costs on the consumer for reminders for payment that exceeded 1,20 Euros per reminder were ineffective under article 309 par. 5 BGB, but the referral to Directive 2011/7 and its predecessor was rejected as this Directive concerned the late payment by businesses, not consumers.

- However, decisions not referring to Directive 93/13 may equally be in line with the Directive.

Courts have held that a clause imposing interest on the consumer for late payment that went beyond the legally set interest was ineffective.[1567] The OLG Frankfurt[1568] similarly rejected a clause that excluded the consumer's possibilities to prove that there was an additional agreement under article 309 par. 12 BGB. The consumer would therefore be given the opportunity to prove the existence of additional agreements. In reality, proving this point may prove rather difficult. The OLG Hamburg[1569] accepted the possibility for setoff, holding, in passing that any clause that excluded this right was contrary to article 309 par. 3 BGB, especially setoffs with regard to claims immediately due. The LG Hamburg[1570] held that a clause that enabled the supplier to cancel the contract when a host family could not be found was ineffective. Although the possibility to cancel was based on sufficient justification, the clause did not, in accordance with article 308 par. 8 BGB, oblige the supplier to inform the consumer as soon as possible and to return payments that had already been made. The LG Köln,[1571] referring to BGH case law, held a clause that stipulated that a sum would be owned to the bank if orders for payments were made while the account contained insufficient funds was unfair and moreover contrary to article 309 par. 5 BGB.

[1561] OLG München 21 September 2009, *BeckRS* 2006, 11928.
[1562] OLG Brandenburg 17 November 2010, *BeckRS* 2010, 30461.
[1563] LG Frankfurt 8 April 2011, *BeckRS* 2011, 8796.
[1564] LG Hamburg 5 September 2003, *MMR* 2004, 190 (without legal force).
[1565]OLG Düsseldorf 26 february 2009, *BeckRS* 2009, 27333.
[1566] OLG München 28 July 2011, *BeckRS* 2011, 16062.
[1567] OLG Brandenborg 7 July 2012, *BeckRS* 2012, 15697,
[1568] OLG Frankfurt 30 November 2011, *BeckRS* 2012, 7451.
[1569] OLG hamburg 30 March 2011, *NJW* 2011, 3524.
[1570] LG Hamburg 20 October 2009, *BeckRS* 2010, 14188.
[1571] LG Köln 11 June 2003, *BeckRS* 2004, 3151 (without legal force).

- In rare cases, both decisions that refer explicitly to the Directive and CJEU case law and decisions that do not refer to the Directive but follow BGH case law may not be in accordance with the Directive, or could have led to interesting questions to the CJEU.

Thus, the KG Berlin,[1572] later repealed by the BGH,[1573] held that the evaluation of clauses is a matter for national courts, and did not subject the VOB/B to judicial evaluation, in accordance with article 310 par. 1 BGB. Although the court distinguishes between providing general criteria for the interpretation of article 3 Directive and the factual question whether a clause is unfair in individual cases, but goes on to characterise the question whether the VOB/B are subject to judicial evaluation as a purely factual one. However, this question may arguably also entail whether, firstly, clauses that have been drafted in cooperation of stakeholders and state actors may be exempted from judicial control as such, as is the case under article 310 BGB. Secondly, the question may arise whether the implementation of the Directive obliges the judiciary to evaluate clauses in the VOB/B, despite the exemption in article 310 BGB, and thirdly, if clauses in the VOB/B are subject to judicial evaluation, whether the circumstance that these clauses typically have not been drafted solely by the user to improve the position of the user of STC's, should be decisive in the judicial evaluation of clauses under article 3 Directive. These are all questions that are not purely factual questions, while the response of the CJEU to these questions would have provided insight in the admissibility of collectively negotiated STC's, which may in turn may be interesting for the use of STC's in transnational cases if they have been collectively negotiated and have been sanctioned by democratically elected actors. The court considers the question whether the VOB/B should be exempt at some length and refers to CJEU case law, European law, and national debate, but eventually upholds the VOB/B, in accordance with article 310 BGB established BGH case law.

A case that could similarly have provided interesting questions for the CJEU is the decision of LG Bamberg[1574] decided that a clause in a contract falling under Directive 90/314 for package travel that stipulated that 40% of the contract price would be due within a week after the confirmation by the travel agency was not necessarily ineffective considering the case law of the BGH, which it however recognised as not uncontroversial. This decision seems to be inconsistent with later decisions that have held these clauses ineffective.[1575] The court rejected the respondents' call for interpretation in accordance with the Directive, as the Directive on package travel did not stipulate the amount of the sum to be paid by the consumer. Notably, the decision is not necessarily contrary to the Directive, and the court was not obliged to refer questions to the CJEU. Yet possibly, a question to the CJEU could have provided insight in the overlap between the Directive on unfair terms and the Directive on package travel. Yet this would however likely have led to a delay in the procedure which is hardly to the advantage of the consumer.

A problematic decision that followed BGH case law rather than the Directive is the decision of the OLG Brandenburg,[1576] referring to BGH case law. The court upheld a clause that required the consumer to declare that he was of age and competent to enter into juridical acts, stating that this does not constitute a clause under article 309 par. 12 BGB that reallocates the burden of proof to the detriment of the consumer. Notably, this information does appear to be rather important to the valid conclusion of a contract.

The OLG Hamm[1577] followed the BGH in upholding a clause silently extending a contract for 24 months for a year. Interestingly, these clauses are more critically evaluated in the Dutch legal order, especially after the recent reform of Dutch law, also inspired by experiences in the French, Belgian, English and Austrian legal order.[1578] These practices are moreover in accordance with the Annex to

[1572] KG Berlin 15 February 2007, *BeckRS* 2007, 6334.
[1573] BGH 24 July 2008 - VII ZR 55/07, *BeckRS* 2008, 15864.
[1574] LG Bamberg 12 April 2011, *BeckRS* 2011, 21455.
[1575] OLG Dresden 21 June 2012, *BeckRS* 2012, 14828 with references to other decisions.
[1576] OLG Brandenburg 11 January 2006, *BeckRS* 2006, 869. Comp. similarly OLG Hamm 24 May 2012, *BeckRS* 2012, 13246.
[1577] OLG Hamm 8 April 2010, *BeckRS* 2010, 20831.
[1578] See further par. 11.3.3.5.

the Directive that includes clauses silently extending contracts if the deadline for the consumer to terminate is unreasonable early.

The decision of the OLG Koblenz[1579] that upheld a clause that stipulated that the consumer was to pay 25% of the price if the consumer wanted to cancel the contract, referring to BGH case law, may similarly be questioned. The court held that this was not contrary to article 309 par. 5 BGB as it had not been established that the seller had suffered remarkably less damages. This decision may be difficult to reconcile with previous decisions of the OLG München[1580] that held a clause that imposed costs for reminders ineffective under article 309 par. 5 BGB. The question arises whether the court should have taken into account the possibility that this decision could go below the minimum level of protection under the Directive.

Because lower courts generally follow BGH case law and decisions from other lower courts, a clear approach on the status of the model lists can also not be found in these decisions. However, without interaction, the status of the European model list is not going to be resolved at the European level. Instead, decisions will continue to be made at the national level, but these decisions may be undermined if courts in other Member States ask questions on the status of the model list, which would necessitate a different approach from German courts. Such a change would undermine predictability.

10.4.2.3.3. Conclusion on the application of the European model list by German courts

The BGH has not adopted a consistent approach to the European model list, nor has it recognised the potential competence of the CJEU to determine what status the list in the Annex to the Directive should have in the adjudication of disputes. Lower courts have followed this approach. Consequently, nether the BGH nor lower courts have referred questions on the European model list to the CJEU. Thus, the status of the model list has not bene clarified by the CJEU. This lack of interaction need not be problematic for private parties, as German courts generally decide cases predictably, consistently and responsively, nor does it necessarily inhibit the correct application of the Directive, except in rare cases.

However, because of the lack of interaction, the obligations of national legislators and courts in the implementation and application of the European model list has remained unclear, while the accessibility of the European model list may also be undermined.

10.4.2.4. Conclusion on the development of the law on STC's through model lists

This paragraph has asked whether actors have interacted in the use of model lists and how that has affected the predictability, consistency, accessibility and responsiveness of the law on STC's.

Whereas the German legislator could not make much use of comparative insights, the drafting of model lists was focused on national practice and consequently overlooked relevant treaties. Foreign legislators and the European legislator have turned to German law for inspiration, and the German legislator has participated actively in the development of the model list in the Annex to the Directive, thereby limiting the effect it has on national law.By the active German participation, interdependence between national and European actors in ensuring the predictability, consistency, and accessibility of private law through model list has remained limited. Nevertheless, the ability of the national legislator to ensure predictability, consistency and accessibility of the law through model lists may become limited as

[1579] OLG Koblenz 13 October 2011, *BeckRS* 2012, 8719, comp. also AG München 31 August 2007, *BeckRS* 2007, 18278.
[1580] OLG München 28 July 2011, *BeckRS* 2012, 16062.

international sources of law indicate that clauses falling under national model lists should be upheld.

Because of the indicative nature of the model list, unclarity has arisen on the obligation of Member States to implement the list, and the German legislator has not separately implemented the European model list. The restraint of the legislator is reinforced by the courts that have not developed a consistent approach to the European model list – it does not have a specific status, nor does the inclusion of clauses under the European model list necessarily form an indication that a clause should be held ineffective. Because of the strict approach of courts to unfair clauses, however, cases are only rarely decided contrary to the Directive.

German actors have shown restraint in interaction with relevant European actors on the obligation for national state actors in the implementation of the model list. However, this restraint of German state actors does not directly lead to problems for private parties, as the restraint serves to maintain consistency, predictability, accessibility and responsiveness for private parties. The resistance of German actors to binding model lists, because of previous negotiations, also limits problems of accessibility and consistency that may arise if the European list woiuld become binding.

Yet eventually, the lack of interaction may lead to persisting unclarity on the status of the European model list, a question that has remained invisible in the attempted reform of Directive 93/13. The added value of the European model list is undermined as it does not play a clear role in national legal practice. However, the European list may also be used to increase the accessibility of private law forespecially foreign parties, who can more easily get an oversight of clauses that are not considered acceptable.[1581]

10.4.3. The evaluation of clauses in international contracts

Have the courts sufficiently taken into account foreign, European and international state and non-state actors, and how has this approach affected the predictability, consistency, accessibility, and responsiveness of the law on STC's in international contracts?

Paragraph 10.4.3.1. will consider the evaluation of international business contracts under article 307 BGB and treaties, and paragraph 10.4.3.2. will discuss the evaluation of clauses in international consumer contracts. Paragraph 10.4.3.3. will turn to the evaluation of domestic business contracts. Paragraph 10.4.3.4. will end with a conclusion.

10.4.3.1. The evaluation of international business contracts

In the evaluation of clauses in international business contracts, courts have generally not referred to foreign materials. The referral to international materiaks differs, depending on the applicable regime. Under German law, courts have frequently referred to international sources and taken into account international practice, which should benefit responsiveness. In contrast, in the evaluation of clauses under international regimes, courts have referred to applicable international regimes, but they have not referred to other materials or international practice, which may undermine the responsiveness of international law to international practice.

Paragraph 10.4.3.1.1. will consider some preliminary questions, and paragraph 10.4.3.1.2. will discuss the evaluation of clauses in international contracts under the Montréal

[1581] Wolf/Lindacher/Pfeiffer/AGB-Recht/Damman (2009), introduction to articles 308-309, nr 1 however notes that the list, with the exception of article 309 par. 11 BGB, aims to protect consumers, not users of AGB's.

Convention that has been ratified by the EU[1582] and implemented through Regulation 889/2002. Paragraph 10.4.3.1.3. will turn to the evaluation of clauses in international contracts under the CMR. Paragraph 10.4.3.1.4. will analyse the evaluation of clauses under the CISG and German law and paragraph 10.4.3.1.4. will end with a conclusion.

10.4.3.1.1. Preliminary questions: comprehensive international regimes?

The intensity of judicial evaluation depends on the question whether international law aims to provide a comprehensive regime to parties.[1583] If a regime is comprehensive, the regime provided by international law is referred to as a standard.[1584] This is for example the case for the Montréal convention, where national rules are only applicable insofar as the Convention does not aim to provide rules – thus, for example, civil procedure law.[1585] The CMR in some areas also aims to provide a comprehensive regime.[1586]

Thus, if international regimes do not leave room for the application of article 307 BGB, it will not be applied. It is not uncontroversial whether article 307 BGB is a provision of *ordre public* in the sense of article 9 Rome I.[1587] However, this does not seem to be the case. For example, in the decision of the OLG Hamburg,[1588] in a case on an international contract falling under the CISG, the OLG did not apply article 307 of its own motion as matter of *ordre public*, even though penalty clauses fall under article 309 par. 6 BGB – though they are not necessarily unfair in business contracts.

Not all treaties aim for a comprehsnive regime: article 4 par. 2 CISG makes clear that the CISG does not aim to provide a comprehensive regime, which means that article 307 BGB will be aplicable.[1589] If German law is applicable, clauses are subject to judicial evaluation under article 307 BGB.

If parties have made a choice of law other than German law, the question has arisen whether foreign default law, instead of default national law, should be taken as a starting point for the evaluation of clauses based on foreign clauses. The applicability of foreign default law would entail that clauses in conformiity with foreign default law would not be subject to judicial control in accordance with article 307 par. 3 BGB.[1590] Clauses that are in accordance with European law are also not subject to judicial review.[1591]

A different view wouldmean that the German judiciary *de facto* evaluates the default regime of other states, which seems undesirable. However, if clauses violate mandatory, *ordre public* provisions, the German judiciary will have to evaluate them of its own motion.

If clauses in international contracts have to be evaluated under German law, they will not be evaluated under articles 305-310 BGB if they have been individually negotiated. This will for example not be the case for some well-established clauses that are more likely to be

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[1582] Council Decision 2001/539/EC of 5 April 2001.
[1583] Wolf/Lindacher/Pfeiffer/AGB-Recht/Hau (2009), AGB im internationalen Geschäftsverkehr, nr 52-55, also Maidl 2000, p. 225.
[1584] Thus, clauses in contracts for transport contracts ('*Allgemeine Deutsche Spediteurbedingungen*') falling under the Montréal Convention would not be subject to judicial evaluation under article 307 BGB, while clauses in contracts under, for example, the CMR, would be subject to judicial evaluation; comp. F. Graf von Westphalen, Vertragsrecht und AGB-Klauselwerke/Vogt (30. Ergänzungslieferung 2012), Transportrecht, nr 203. See critically on the interpretation of these clauses K.U.Bahnsen, 'AGB-Kontrolle bei den Allgemeinen Deutschen Spediteurbedingungen', *Transportrecht* 2010, p. 19 et seq.
[1585] BGH 22 July 2010, *BeckRS* 2011, 721, accordingly, denying the applicability of the Convention, OLG Düsseldorf 12 March 2008, *BeckRS* 2008, 9758.
[1586] See for the areas in which the CMR does not aim to provide a comprehensive regime Ferrari/Kieninger/Mankowski et al., Internationales Vertragsrecht/Ferrari (2011), article 1 CMR, nr 3.
[1587] MunchKomm zum HGB (2009), introduction to articles 343 et seq, nr 39. See further Ferrari/Kieninger/Mankowski u.a., Internationales Vertragsrecht/Staudinger (2011), article 9 Rome I, nrs 5 et seq.
[1588] OLG Hamburg, 25 January 2008, 12 U 39/00, http://www.unilex.info/case.cfm?id=1352.
[1589] Ulmer/Brander/Hensen/AGB-Recht/Schmidt (2011), annex to article 305 BGB, nr 33.
[1590] Maidl 2000, p. 187-188.
[1591] BGH 3 February 1993, *NJW-RR* 1993, p. 691.

considered to have been initiated by both parties.[1592] Also, if clauses reflect practices in the sense of article 346 HGB, or in the sense of article 9 CISG, they will not be subject to judicial control, in accordance with article 307 par. 3 BGB that stipulates that terms that reflect provisions from mandatory or default national or international private law, are not subject to judicial evaluation under article 307 BGB. Although this will not often be the case,[1593] this exception is in accordance with the need in business practice to speedily deal with these matters, while they have also more experience with the use of STC's. Maidl[1594] finds that FOB clauses from the ICC (A.5) often converge with international practice, although they do not establish, as such, international practice.[1595] Pilz[1596] finds that referring to Incoterms is a practice in the sense of article 9 CISG, while the terms cannot be characterised as individually negotiated terms. However, Hopt[1597] notes that the applicability of Incoterms does not exclude the applicability of the CISG, and they may be subjected to judicial evaluation of article 307 BGB.

10.4.3.1.2. The evaluation of clauses under the Montréal Convention

The Montréal Convention provides a comprehensive regime and does not leave room for additional evaluation of clauses under article 307 BGB.

- Initially, the BGH emphasised the uniform interpretation of the Convention.

The BGH[1598] expressly indicated the methods of interpretation for a uniform interpretation. In particular, it held that an international interpretation entailed a grammatical interpretation. Especially if the legislative history of the international instrument was unclear, the aim of the instrument was to be taken into account, as well as the internal coherence of the instrument, while referral to national concepts was to be avoided.

- Despite this emphasis, the BGH has not interacted with foreign actors, and although the courts take into acocunt the CMR, other international sources are not considered, and courts have typically evaluated clauses in accordance with German law.

The tendency to decide in accordance with German law is clearly visible in a decision where the BGH[1599] held that although an air operator had excluded liability in accordance with the Montréal Convention (at that time still the Warsaw Convention), German law on breach of contract was additionally applicable.

The BGH held that the convention only stipulated the compensation for property arising from air traffic, which includes delay. However, damages arising from breach of contract because the air operator had overbooked a flight did not constitute delay, while it was also not a risk inherent to air traffic. Rather, overbooking is the result of organisation procedures that are under the control of the air operator. As the damages did not fall within the scope of the convention, the convention was not applied on this point. It followed that the clause excluding damages arising from delay was also not applicable to cases where damages arose because a flight had been overbooked.

[1592] See previously par. 10.3.3.2.1.
[1593] Baumbach/Hopt/Handelsgesetzbuch/Hopt (2012) article 346 nr 10.
[1594] Maidl p. 112-113. Accordingly OLG München 19 December 1957, *NJW* 1958, 426. Comp. for domestic trade, for the inclusion of the ADSp, BGH 10 May 1984, *NJW* 1985, 2411.
[1595] Ulmer/Brandner/Hensen/AGB-Recht/Ulmer/Habersack (2011) article 305 nr 172.
[1596] B. Pilz, 'Incoterms und UN-, Kaufrecht', in: K.-H. Thume (ed.), *Transport- und Vertriebsrecht 2000*, *Festschrift für Prof.Dr. Rolf Herber*, 2000, p. 21. Accordingly LG Hamburg, 26 September 1990, 5 0 543/88, http://www.unilex.info/case.cfm?id=7.
[1597] Baumbach/Hopt/ Handelsgesetzbuch/Hopt (2012), introduction to Incoterms.
[1598] BGH 19 March 1976, *NJW* 1976, 1583, followed by the OLG Frankfurt 23 December 1992, *NJW-RR* 1993, 809, however without referral to foreign sources.
[1599] BGH 28 September 1978, *NJW* 1979, 495.

In a later decision, the BGH[1600] solely referred to German sources.

- This approach is also followed by lower courts.

This BGH decision was followed by the OLG Köln[1601] that similarly applied national law on breach of contract. Although the court extensively referred to previous German case law, as well as German commentaries to the Convention, it did not take into account foreign decisions. The AG Hamburg[1602] ruled that applicability of the Convention would lead to a similar result reached in German law.

►Alhough the BGH recognised the need for uniform interpretation, this did not entail referring to foreign sources or overlooking national mandatory law. Instead, courts have maintained a consistent interpretation of the Convention within in the German legal order.

10.4.3.1.3. The evaluation of clauses under the CMR

The CMR provides a regime that does not leave room for additional evaluation under article 307 BGB, but it does not provide a comprehensive regime in all respects.

- Initially, the BGH[1603] referred to the Incoterms to determine parties' rghts and obligations.

The BGH held that all clauses on prescription were to be judged exclusively by the CMR that aimed to provide a comprehensive regime in matters of prescription. The court further referred to the Incoterms for establishing the rights and duties of parties towards one another. The court held that the case did not have to be evaluated under the *Kraftverkehrsordnung*.

This decision was followed by the OLG Frankfurt[1604] held a clause on prescription from the *Allgemeine Deutsche Spediteurbedingungen* ineffective as it was incompatible with article 32 CMR

- Since this decision, however, the BGH has generally not referred to international sources other than the CMR, or foreign decisions, but rather its own previous decisions, while national mandatory law played a more prominent role in the evaluation of clauses.

In a 1983 decision, the BGH[1605] held that a clause, forming part of the ADSp ('*Allgemeine Deutsche Spediteurbedingungen*'), that excluded set off and counterclaims was irreconcilable with article 41 CMR. In addition, it held that the clauses also contradicted complementary mandatory national law, in particular the law on goods transport ('*Güterkraftverkehrsgesetz*') as well as the regulation on goods transport ('*Kraftverkehrsordnung*'), as well as civil procedure law.

In a 1984 decision, the BGH[1606] held that a clause in an insurance contract under the CMR, excluding article 6 VVG, was ineffective under article 9 AGBG as it unfairly excluded the duty of the insurer in all where the insured was negligent, however minimal that negligence was, regardless whether the negligent behaviour affected the position of the insurer.

[1600] BGH 21 September 2000, *NJW-RR* 2001, 396.
[1601] OLG Köln 2 December 2003, *BeckRS* 2004, 3006.
[1602] AG Hamburg 4 April 2007, *BeckRS* 2007, 15103.
[1603] BGH 18 February 1972, *NJW* 1972, 1003.
[1604] OLG Frankfurt, 14 July 1980, *NJW* 1981, 1911.
[1605] BGH 20 January 1983, *NJW* 1983, 1266.
[1606] BGH 9 May 1984, *NJW* 1985, 559.

►In the evaluation of clauses under the CMR, the BGH has taken into account the CMR, but only very rarely international sources and generally not foreign decisions. Instead, clauses are evaluated in accordance with national law, and German courts have maintained the consistent evaluation of clauses under the CMR.

10.4.3.1.4. The evaluation of clauses under the CISG and German law

If the CISG is applicable, clauses are subject to evaluation under article 307 BGB. Have clauses in cases falling under the CISG been evaluated differently than clauses in cases falling under German law?

- Courts have held clauses under the CISG ineffective under the AGBG and article 307 BGB, without referring to foreign materials or other international sources. Instead, clauses have been evaluated in accordance with national law, in particular articles 10-11 AGBG and later articles 308-309 BGB. [1607]

LG Heilbronn[1608] held that in an international contract between businesses falling under the CISG, an exclusion clause was invalid under article 9 AGBG, expressly referring to previous case law in its statement that these articles were also applicable in business contracts. The court moreover held that as judicial evaluation was not established in international law, the standard of article 9 AGBG had to be applied, but it also referred to default rules in the CISG, in particular article 74 CISG, as a standard.

OLG Braunschweig[1609] held a clause fixing the amount of damages ineffective, referring to article 11 AGBG, and, for the applicability of German law, German literature, holding that the CISG did not provide rules that entailed a different conclusion. The court moreover held that the decision would be similar under German law.

- In the evaluation of clauses in cases under German law, surrounding national law plays a role.

Accordingly, the BGH held the exclusion of liability in the ADSp included in a transport contract ineffective under article 9 AGBG as it diverged from articles 475 HGB and 278 BGB.[1610]

- However, clauses may also be upheld despite conflict with national law if they are in accordance with international business practices. In these cases, considerably more referral is made to international materials.

In a sea transport case where a clause of the ADSp excluded liability, contrary to article 606 HGB, the BGH [1611] ruled that this clause was not ineffective under article 9 AGBG considering the well-established business practice to establish these clauses, as reflected in the International Convention for the unification of certain rules of law relating to bills of lading (‘Hague Rules’).

The BGH has moreover ruled that clauses are ineffective if they aim to circumvent mandatory rules on liability in the Hague Rules, which is contrary to article 662 HGB,[1612] although it also held that even if this is the case, forum clauses may still be acceptable if the Hague Rules are incorporated in the contract.[1613]

[1607] Also Baumbach/Hopt/ Handelsgesetzbuch/Hopt (2012), introduction to Incoterms, nr
[1608] LG Heilbronn, 15 September 1997, 3 KFH O 653/93, http://www.unilex.info/case.cfm?id=439, par. 4.3.
[1609] OLG Braunschweig, 28 October 1999, 2 U 27/1999, http://www.unilex.info/case.cfm?id=444, par. 3 hh and b.
[1610] BGH 15 September 2005, *BeckRS* 2005, 14476.
[1611] BGH 26 June 1997, *NJW-RR* 1997, 1253.
[1612] BGH 30 May 1983, NJW 1983, 2772.
[1613] BGH 21 December 1971, *NJW* 1971, 325.

In another case for sea transport, the BGH[1614] held that exclusion clauses drafted by the Baltic and International Maritime Conference (BIMCO) were contrary to good faith under article 9 AGBG, but pointed to the necessity to adequately establish whether the claimant had not suggested the use of clauses.

In another international contract for sea transport, the BGH[1615] expressly did not consider penalty clauses unfair, and referred to various international model contracts containing such clauses, including BIMCO clauses, while also considering the justification for the use of such clauses in sea transport. Interestingly, however, the BGH did mention, in passing, article 11 AGBG.

The BGH[1616] held an exclusion clause of a shipbuilding yard effective as it did not, in this case, constitute an exclusion of the main obligations in the contract, which would undermine the aim of the contract, also pointing to the generally usual, widely established practice with no known exceptions, to insure the ship owner for damages to the ship, on which the shipyard could reasonably rely. Simultaneously, however, the court held that article 11 AGBG, although not applicable in business contracts, could indicate that a clause is unfair under article 9 AGBG.

- This approach has been followed by lower courts, who have also taken into account international business contracts.

The OLG Stuttgart,[1617] in holding a model-like declaration for surety effective, expressly held that these clauses are not unusual in international trade and particularly in international trade, there was a justifiable need for these sureties, while parties to the agreement were hardly in need of protection. Also, the OLG Saarbrücken[1618] upheld a clause in an insurance contracts that imposed a duty of care on the transporter and stipulated that the damages would not be refunded if this duty had been breached. The court referred not only extensively to previous BGH case law but also to international materials, and held that this duty of care is well-established in transport law, upholding the clause. The court further expressly referred to the CMR and held that upholding the clause was also consistent with the CMR.

►In the evaluation of clauses under the CISG, the courts have adopted more restraint in the referral to international sources than is the case if clauses are evaluated under German law. Thus, the courts do recognise the added value of international sources, and it is likely that the evaluation of clauses under German law is more responsive to international practice.

10.4.3.1.5. Conclusion on the evaluation of clauses in international business contracts

The referral to international materials in cases decided under German law may promote the responsiveness of German law to international practice, while the restraint of courts in cases decided under international regimes may undermine responsiveness. Even though German courts have consistently evaluated clauses under international treaties, this may not be as accessible foreign parties. Moreover, the added value of the CISG does not contribute to predictability as courts have not referred to easily available foreign decisions.

Courts have recognised the added value of foreign decisions in the interpretaiton of STC's in international contracts, so why have they adopted more restraint in the evaluation of clauses, especially considering the easy availability of foreign decisions under the CISG? The emphasis on interpretation in accordance with national law suggests that the consistent evaluation of clauses within the German legal order has a higher priority. Perhaps, the

[1614] BGH 28 February 1983, *BeckRS* 1983, 30386936.
[1615] BGH 28 September 1978, *NJW* 1979,105.
[1616] BGH 3 March 1988, *NJW* 1988, 1785.
[1617] OLG Stuttgart 1 December 2010, *BeckRS* 2011, 2432.
[1618] OLG Saarbrücken 18 June 2003, *BeckRS* 2003, 30321130.

correlation between the evaluation of clauses and the values underpinning German law, which may differ from the values underpinning foreign, European and itnernational law, has also played a role in courts' restraint.

Does the different approach to cases under international regimes and cases under German law, which has also become visible in the interpretation of STC's in international trade, contribute to the beneficial position of German law over international sources?

Possibly, the legislator's rejection of regulatory competition in this area may be compensated by the courts, even though the approach of courts is not as visible to foreign parties as legislative intervention. However, the active approach of courts combined with restraint for the legislator facilitates the consistent development of the law on STC's within a clear framework, whcih also benefits predictability.

10.4.3.2. The evaluation of clauses in international consumer contracts

In the evaluation of clauses in international consumer clauses, the BGH has interpreted clauses in accordance with national mandatory law despite contradictory international or foreign law, and exercised restraint with referring quesitons to tje CJEU. This has undermined accessibility and predictability.

- Initially, the BGH took into account international regimes in the evaluation of clauses in international consumer contracts.

In a 1978 decision, the BGH[1619] upheld a clause limiting the liability of the airline operator in accordance with article 22 Warsaw Convention, stating that article 22 also concerned the loss of valuables that were handed to the crew as the plane had to make an emergency landing. In this decision, the BGH emphasised that the Convention should be interpreted uniformly, referring to its earlier decisions where this had similarly been emphasised. The BGH did however not refer to foreign decisions that would have contributed to a uniform interpretation, although one of these previous decisions[1620] expressly relied on French and U.S. materials for the interpretation of the Convention.

- In later cases, the BGH has held clauses ineffective despite relevant international and foreign law and article 1 par. 2 Directive 93/13 that stipulates that clauses reflecting national law, or international law are not subject to judicial evaluation under the Directive.

In a 1983 decision, the BGH[1621] held that a clause that stipulated that times of arrival were merely estimates and did not bind airline operators, which excluded compensation for damages caused by delay, was ineffective, even though this clause reflected the recommendation of the International Air Transport Association (IATA) and was in accordance with the Warsaw Treaty, and article 22 Montréal Convention. Similarly, a clause giving the airline operator the right to amend the contract was held ineffective. Interestingly, this decision was cited by the European Commission in its 1990 proposal for a Directive on unfair contract terms, to demonstrate the ineffectiveness of internationally used clauses in contracts with consumers in Germany, as a reason for harmonisation.

In a 2005 case,[1622] the BGH also held that a clause in an international bus transport contract with a consumer was ineffective as it limited the basic performances of the contract to the extent that

[1619] BGH 28 November 1978, *NJW* 1979, 496.
[1620] For example BGH 23 March 1976, *NJW* 1976, 1587, as well as BGH 24 June 1969, *NJW* 1969, 2008.
[1621] BGH 20 January 1983, *NJW* 1983, 1322. Comp. also BGH 24 September 1985, *NJW* 1986, 1610 where an exclusion clause from an international association contrary to article 11 par. 6 AGBG was held ineffective.
[1622] BGH 1 February 2005, *NJW* 2005, 1774, comp. also KG Berlin 12 December 2007, *BeckRS* 2009, 24853.

the purpose of the contract was undermined, which, under article 307 par. 2 BGB, leads to ineffectiveness of the clause. The strict approach of the BGH is also visible in a later case, where the BGH[1623] held a clause limiting the liability of the airline operator for damages to luggage, and stipulating that airline operators had a right to refuse vulnerable or perishable goods in the luggage, was contrary to article 17 of the Convention. The BGH held that if a clause diverging from article 17 limits the liability of the airline operator, this results in an unfair detriment to the consumer that is ineffective under article 307 BGB. The BGH rightly does not consider the recommendation of international organisations or often-used model clauses in consumer contracts as decisive. Especially if these clauses fall under the Annex to Directive 93/13, they should be adapted.

The German judiciary also adopted a strict approach with regard to international contracts that have been validly concluded under English law and have made a valid choice of jurisdiction for English courts, as becomes apparent from the decision of the OLG Frankfurt[1624] that held that the clauses should be evaluated under the AGBG as the contracts showed a close connection with Germany, while it was also not sufficiently established that the clauses would not be applied in consumer contracts. Even if this would not be the case, the clauses had to be evaluated under German law as a different decision left open the possibility that the outcome of cases would be irreconcilable with the AGBG. Despite harmonisation in this area, the court held that it was unclear whether English law provided sufficient protection to consumers as the Unfair Contract Terms Act 1977 was not applicable to credit contracts, while it was unclear whether the Unfair Terms in Contracts Regulations 1994 would be applicable to the contracts in this case. The court however proceeded to uphold the clauses.

Thus, German courts have steadfastedly refused to recognise the ability of internaitonal or European actors to limit national mandatory law. Accordingly, interdependence has not been recognised and interaction with European, foreign and international actors has remained limited.

This refusal for interaction need not be problematic for consumers, who can rely on national law, but it may undermine predictability for international or foreign actors who rely on treaties and European law. Moreover, questions on the relation between the Montréal Convention and Directive 93/13 have remained unresolved at the European level, which undermines consistency and accessibility.

Both European and national legislators who have ratified the Convention should reconsider either article 22 of the Convention or make an exception for the Convention in the Directive, which should moreover be clearly implemented in national legislation in order to ensure that this change is sufficiently followed by the courts.

Moreover, the question arises whether article 8 Directive would justify the conclusion that Member States can evaluate clauses that are in conformity with treaties that have been ratified in and by the Union. This question seems also relevant for the aim of the Directive to further the internal market, especially as allowing judicial evaluation of clauses in conformity with international law undermines the use of clauses under international regimes in the internal market. As it concerns the interpretation of a Directive, the CJEU is competent.

Moreover, the question whether arises German courts are competent to set aside mandatory national law, especially as international law, implemented in national law, does not have priority over other national law. This question should also be resolved if clauses in accordance with future European measures such as the CESL may also undermine national mandatory law, which may lead to further inconsistencies.

[1623] BGH 5 December 2006, *NJW* 2007, 997.
[1624] OLG Frankfurt 1 November 2006, *BeckRS* 2007, 1589.

However, because of the lack of interaction between German courts and the CJEU, these questions have not been addressed.

10.4.3.3. The evaluation of clauses in domestic business contracts

The approach of the BGH to the evaluation of clauses used in international trade is more lenient than the evaluation of clauses used in national trade. The standard applied in the judicial evaluation of clauses in business contracts under article 307 BGB is largely similar to the standard of evaluation for consumer contracts under articles 307-309 BGB. [1625]

- This becomes especially apparent from the indirect applicability of article 309 BGB in business contracts. Clauses falling under article 309 BGB are unfair.

The BGH[1626] held a clause limiting the period of prescription ineffective, noting that business practices did not indicate otherwise, as businesses were disadvantaged by these clauses in a way similar to consumers, while they were not inherently better placed to discover deficiencies in goods that inherently became visible only after some years.

Similarly, the BGH[1627] considered a comprehensive exclusion clause as ineffective. Generally, exclusion clauses are, in accordance with article 11 par. 7 AGBG and article 309 par. 7 under b BGB, as such not necessarily prohibited, but they are held ineffective if they concern a main obligation of the contract which undermines the aim of the contract.[1628]

Additionally, the BGH[1629] has ruled that clauses with regard to the burden of proof that fall under article 309 par. 12 sub a BGB are unfair in business contracts as rules on the burden of proof are closely correlated with ideas on justice. Although article 436 BGB, implementing Directive 1999/44, allows that the burden of proof is shifted to the detriment of the seller, this should be seen against the background of consumer protection. In this case, the user of STC's does not have a weak position similar to a consumer, and STC's that shift the burden of proof to the advantage of the user of the STC's are accordingly ineffective.

- Business practices are only rarely accepted as a reason to hold clauses effective.

Examples of such an exception are penalty clauses in building contracts.[1630] In contrast, clauses may be ineffective despite the recommendation of stakeholder organisations.[1631]

Thus, courts have adopted a considerably more lenient approach to clauses in international contracts, which may benefit the responsiveness of the law on STC's to international practice. Hau[1632] finds that the diverging approach can be traced to the assumption that parties engaged in international trade are in less need of protection than parties in national trade, with the apparent exception of consumers engaged in international trade.

10.4.3.4. Conclusion on the evaluation of clauses in international contracts

[1625] R. Koch, 'Das AGB-Recht im unternehmerischen Verkehr: Zu viel des Guten oder Bewegung in die richtige Richtung?', *BB* 2010, p. 1813, who also finds that the rarity of cases where clauses are upheld because of business practices difficult to reconcile with the wording of article 310 BGB.
[1626] BGH 8 March 1984, *NJW* 1984, 1750.
[1627] BGH 19 September 2007, *NJW* 2007, 3774.
[1628] Comp. for example also BGH 24 October 2001, *NJW* 2002, 673, BGH 11 November 1992, *NJW* 1995, 335.
[1629] BGH 5 October 2005, *NJW* 2006, 47.
[1630] BGH 12 October 1978, *NJW* 1979, 212. Comp. also OLG Köln 3 April 1992, *NJW-RR* 1992, 1448.
[1631] BGH 25 October 1995, *NJW* 1996, 389.
[1632] Wolf/Lindacher/Pfeiffer/AGB-Recht/Hau (2009), AGB im internationalen Geschäftsverkehr, nr 57. Comp. for a separate standard for international trade M. Wolf, 'Auslegung und Inhaltsontrolle internaitonale AGB', *ZHR* 1989, p. 312.

The interaction between courts with international actors differs depending on the question whether it concerns a business contract or a consumer contract, as well as the regime udner which clauses are evaluated. Clauses in international consumer contracts and domestic business contracts are strictly evaluated, despite the relevance of international and European law in international consumer contracts.

Although the lack of interaction is not directly detrimental to consuemrs, it dimishes predictability for epecially foreign or internaitonal businesses and questions on the relation between European measures and on the competence of German courts have been left unanswered, which may undermine the predictable, accessible, and consistent development of the *acquis*.

The difference between the evaluation of clauses in international contracts, especially udner German law, and the evaluation of clauses in domestic contracts reinforces the impression that the strictness of German law and the rejection of rgeulatory competition by the German legislator is compensated by the approach of the courts. Even though German law is strict, it is not similarly applied in international cases. This approach allows the German legislator to maintain the development of the law in accordance with national legal views on justice while not diminishing the responsiveness of the law on STC's to international practice, something that is overlooked by the concerns for the attractiveness of German law[1633] as well as private initative for regulatory competition in this area[1634] Arguments that German law poses barriers to the internal market should similarly be reconsidered insofar as it concerns business contracts.[1635]

10.4.4. Conclusion on the development of the law on STC's through blanket clauses

Have actors taken into account that other actors also develop private law, which may limit the extent to which blanket clauses contribute to the responsiveness of law, while more problems of predictability, consistency and accessibility may arise?

Generally, the German legislator have actively participated in debate at the European level preceding harmonisation, which has limited the extent to which the *acquis* influences national law. Simultaneously, German state actors have shown restraint in interacting with European and international actors and sources in the implementation and application of the *acquis* and relevant international law. The restraint in the implementation of the *acquis* has generally benefitted the consistency, predictability, accessibility and responsiveness for private parties. The restraint of German actors in international cases may be detrimental to some private parties in terms of predictability and accessibility, as well as responsiveness. However, generally, the lack of interaction may eventually severely undermine the predictable, consistent, accessible and responsive development of the *acquis*.

[1633] Bundesregierung, *Entwurf eines Gesetzes zur Modernisierung des Schuldrechts*, BT-Drucks. 14/6857, p. 17.
[1634] Differently M. Günes, T. Ackermann, 'Die Indizwirkung der §§ 308 und 309 BGB im unternehmerischen Geschäftsverkehr', *ZGS* 2010, p. 400, 402, with further references, who argue that the judicial control of clauses in business contracts makes it nearly impossible for the German legislator to present German law as an attractive "product" for international contract parties.
[1635] Also Berger *NJW* 2010, p. 467,

10.5. Principles

What principles have played a role in the development of German and European law on STC's, have these principles provided a starting point for interaction between actors and how has that affected the extent to which principles have contributed to the predictability, accessibility, consistency and responsiveness of the law on STC's?

This paragraph will in particular consider three principles that have played an important role in the development of the law on STC's:

1) Good faith

The development of German law on STC's was based on article 242 BGB on good faith, and since the AGBG and its later inclusion in the BGB, good faith in article 307 BGB remains a central concept in the judicial evaluation of standard contract terms. At a European level, good faith has similarly been included.

2) Consumer protection

The development of the AGBG was initiated against the background of a consumer protection policy, and Directive 93/13 similarly takes consumer protection as a starting point.

3) The *Richtigkeitsgewähr*.

The *Richtigkeitsgewähr* will also be considered, as this principle is often referred to as underlying articles 305-310 BGB, which raises the question whether it converges with consumer protection underlying the Directive.

Paragraph 10.5.1. will consider the development of German law on the basis of these principles, and paragraph 10.5.2. will consider the development of European law on the basis of consumer protection and good faith. Paragraph 10.5.3. will consider similarities in the development of the law on STC's by German and European actors and paragraph 10.5.4. will turn to divergences. Paragraph 10.5.5. will end with a conclusion.

10.5.1. The development of the German law on STC's

The development of the German law on STC's can be seen against the background of three principles: consumer protection, good faith, and the *Richtigkeitsgewähr*.

The AGBG was developed against the background of German consumer policies.[1636] The AGBG aimed to provide more clarity for contract parties and especially consumers as case law provided insufficient predictability, which withheld consumers from challenging unfair STC's before the courts, while the limited effect of case law enabled practitioners to successfully enforce slightly different forms of clauses that had been prohibited.[1637]

In the development of the law on STC's, the principle of good faith has played an important role. The Erster Teilbericht[1638] stated that draft article 6 AGBG – eventually article 9 AGBG – would enable sufficient protection of consumers that would not leave gaps and make the principles underlying the new regime clear. In particular, the draft held that judicial evaluation of STC's was needed as the user of STC's usually drafted STC's to his own advantage, limiting the contractual freedom of his contract party to the choice to accept or

[1636] Comp. Bericht der Bundesregierung zur Verbraucherpolitik, 18 October 1971, BT-Drucks. VI/2724 (reprinted in E. von Hippel, *Verbraucherschutz*, Mohr Siebeck: Tübingen 1986, p. 295.)
[1637] Erster Teilbericht, p. 18.
[1638] Erster Teilbericht, p. 52.

decline the STC's. Good faith obliged the person drafting STC's to take into account the interests of his cotnract parties. Thus, parties may use STC's as long as a balance between contract parties' rights and obligations was effected. The principle of good faith moreover looks at the relation between parties in general, and does not limit itself to isolated facts and clauses. Moreover, article 9 AGBG established a more accessible and consistent standard than had previously been established in case law based on article 242 BGB.[1639]

Kötz[1640] pointed to the necessity to establish a blanket clause that clearly indicated which principles underpinned the legislative measure, and added that although case law had developed on this basis, a legislative provision was desirable as the standard in case law differed and accessibility decreased as the amount of case law using slightly different criteria as a starting point developed. Kötz does not expressly refer to good faith. Instead, he takes the *Richtigkeitsgewähr*, and the absence thereof in the use of STC's, as a starting point for the control of STC's.

Thus, the development of the law on AGBG has also been based on the *Richtigkeitsgewähr*.[1641] The use of STC's as a legal problem which gave one party too much opportunity to impose his own rules on weaker parties, and which led to a separate private order beside the law, had already been identified in 1933.[1642] The importance of the *Richtigkeitsgewähr* and private autonomy is also visible in BGH case law.

In its 1956 decision in which the BGH[1643] evaluated a clause in the STC's with the standard of article 242 BGB, it explicitly referred to scholarly work[1644] establishing the problems arising from the use of STC's, in particular the weak justification of STC's by private autonomy, although it did not explicitly refer to the idea of *Richtigkeitsgewähr*. In 1974, the BGH[1645] emphasised as standing case law that parties using STC's, claiming the amount of contractual freedom allowed within the legislative framework to their own advantage, must take the interests of future contract parties into account.

Since these decisions, the development of the law on STC's, and the need for judicial evaluation of STC's but not of individual contracts, can be seen in the light of the *Richtigkeitsgewähr*.[1646] Thus, acadamics have succeeded in providing a convincing explanation for the control over STC's that more generally underpins the BGB and is correlated to important legal principles such as *Selbstbestimmung* und *Fremdbestimmung*, and that may serve to provide guidelines for the stable development of the law on STC's.

Notably, the principles of consumer protection, good faith and *Richtigkeitsgewahr* show considerable overlap; as *Richtigkeitsgewähr* is absent in cases where parties have not negotiated contractual terms, the general duty of good faith imposes on the user of STC's an obligation to take into account the reasonable interests and the legitimate expectations of his counterparty, in particular if that counterparty is in a weaker bargaining position.

[1639] Erster Teilbericht, p.
[1640] Kötz, 50. DJT, p. 52-53.
[1641] See for example F. Becker, 'Die Reichweite der AGB-Inhaltskontrolle im unternehmerischen Geschäftsverkehr', *JZ* 2010, p. 1098.
[1642] H. Großmann-Doerth, Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht, reprinted in U. Blaurock, N. Goldschmidt, A. Hollerbach (eds.), *Das selbstgeschaffene Recht der Wirtschaft. Zum Gedenken an Hans Großmann-Doerth (1894-1944)*, Mohr Siebeck: Tübingen 2005, p. 77 et seq.
[1643] BGH 29 October 1956, II ZR 79/55, *NJW* 1957, 17.
[1644] Interestingly, this included the prominent work of L. Raiser, *Das Recht der Allgemeinen Geschäftbedingungen*, 1935, p. 277 et seq who subsequently disagreed with the *Richtigkeitsgewähr* defended by W. Schmidt-Rimpler, 'Grundfragen einer Erneuerung des Vertragsrechts', *AcP* 1941, p. 130 in L. Raiser, 'Vertragsfunktion und Vertragsfreiheit', in: E. von Caemmerer, E. Friesenhahn, R. Lange (eds.), *Hundert Jahre deutsches Rechtsleben, Festschrift zum hundertjährigen Bestehen des Deutschen Juristentages, I*, Muller: Karlsruhge 1960, p. 118.
[1645] BGH 27 November 1974, VIII ZR 9/73, *NJW* 1975, 163.
[1646] Ulmer/Brandner/Hensen/AGB-Recht/Fuchs (2011) article 307 nr 3.

However, the principle of consumer protection and the principle of consumer protection do not necessarily coincide. Consumer protection emphasises that the capacity of one contract party as a consumer is a reason for judicial evaluation. Accordingly, if a consumer is in a weak position, for example because he has insufficient information to adequately negotiate, the contract may not fall within the *Richtigkeitsgewähr*. In contrast, the capacity of one party as consumer need not necessarily exclude the *Richtigkeitsgewähr*, for instance if legal professionals, acting as consumers, negotiate with small businesses.

This became clear in a case in which the BGH[1647] held that a consumer who had negotiated on part of the STC's should prove that the STC's had been presented. This decision can be contrasted with the wording of article 3 par. 2 Directive 93/13, which stipulates that any seller or supplier who claims that a clause has been individually negotiated, should prove this claim. This article further provides that the circumstance that part of a contract has been individually negotiated shall not exempt the STC's from judicial control of 'if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract'.

Thus, principles of consumer protection, but especially good faith and the *Richtigkeitsgewähr* play an important role in the development of the law on STC´s.

10.5.2. The development of the European law on the basis of principles?

Has Directive 93/13 similarly been developed on the basis of principles of consumer protection, good faith and the *Richtigkeitsgewähr*?

It is controversial whether the 1993 Directive has been developed on the basis of general ideas on justice, which may in turn provide a basis for the further development of the law. For the European legal order, the development of the law has been based on article 114 TFEU to advance the internal market as well as consumer protection.

Rather than basing its initiatives on abstract ideas of fairness, the European legislator has particularly intervened in areas that it considers important for the internal market. However, in the Directive, the principle of good faith is quite visible, as well as the principle of consumer protection. That does however not mean that these principles have played a similar role in the development of the Directive.

Directive 93/13 was developed against the background of development in the national laws on STC's as well as the calls for a development of a European consumer policy at the European level.[1648] Accordingly, the preamble to the Directive refers to a consumer protection and information policy and notes that buyers should be protected against abuse of powers from sellers or suppliers similarly seems to take the weak position of consumers as a starting point.

Moreover, article 3 Directive expressly refers to good faith. Yet does a European principle exist or not, and if so, is it a principle "confined" to this particular Directive or is it a general principle that has been recognised, to a different extent, throughout the Union? Geelhoed[1649] has argued that article 3 Directive need not be interpreted uniformly, but subsequent CJEU case law appears prepared to provide general guidelines for the interpretation of national law implementing article 3 Directive. Notably, article 3 Directive also refers to the balance of parties' rights and obligations.

[1647] BGH 15 April 2008, *BeckRS* 2008, 12098.
[1648] Comp. resolution 543 (1973) of the consultative assembly of the European council on a consumer protection charter. The OECH similarly promoted consumer protection, comp. its 1972 report on consumer policy in member countries
[1649] Freiburger Kommunalbauten, [2004] ECR, p. I-3403, 30.

The 1990 draft of the Directive was considerably influenced by German criticism. Although German ideas on justice underpinning the AGBG have influenced German criticism that subsequently led to amendments of the 1990 draft Directive, they did not form a starting point for interaction between German or European actors, nor did these principles serve to establish common ground in the European debate. Nevertheless, the Directive may indirectly be based on abstract ideas of consumer protection and good faith. However, the *Richtigkeitsgewähr* is not visible in the Directive.

10.5.3. Principles underlying the development of the law on STC's: similarities

Various similarities with regard to the principles of good faith and consumer protection become visible in German law and the Directive.

1) Both the AGBG and the Directive have been developed against the background of consumer protection policies.

In the German legal order, this principle follows from the protection of contract parties that are in a weaker bargaining position than their counterparties that in turn may undermine the bargaining process. The Directive was similarly developed against the background of the development of a consumer protection policy. A common development on the law of STC's and more generally a common development of consumer protection has been visible throughout the Union.[1650]

2) Both the AGBG and the Directive consider the effect on trade.

The Directive expressly considers consumer protection in the context of the internal market, stating that divergences in consumer protection lead to unpredictability in cross-border contracts, and distortion of competition.[1651] In the German legal order, the increasing role of STC's in national trade, their effectiveness in stipulating one's legal relations with a multitude of parties, and the need to ensure that contract parties would not inherently distrust STC's, played a role in the draftin g of the AGBG.

3) Good faith plays a central role in evaluating parties' contractual rights and obligations.

It has been argued that the inclusion of good faith in articles 307 BGB and article 3 Directive is in line with a common principle of good faith underlying European private law.[1652] If this is the case, does the interpretation of this principle depend upon the national interpretation of that principle? Brandner and Ulmer,[1653] criticising the 1990 draft Directive, found that 'good faith' provided sufficient guidance to decide which clauses were unfair, as it was clear that the Directive aimed for an overall assessment of the terms of the contract, especially with regard to the rights and obligations of the consumer and seller towards each other. It is however unclear in what way practitioners could derive guidance on the question when rights and obligations would be deemed to be sufficiently balanced. Possibly, this denotes the well-established interpretation of a principle that is assumed to be common to the Union and its Member States, the interpretation of which is further developed at a national level. This seems especially plausible considering that article 3 Directive was based on similar blanket clauses that had been developed throughout the Union.[1654]

If article 3 Directive 93/13 may accordingly be interpreted in a decentralised manner, it is unlikely that article 3 would serve as a basis for the development of case law, similar to the way article 242 BGB has served as a basis for the development of German law on STC's. How can this possibility

[1650] Comp. the conclusion of A.G. Trstenjak before Caja de Ahorros, case C-484/08, [2010] ECR, p. I-4785, par. 64
[1651] Similarly B. Dauner-Lieb, C. Axer, 'Quo vadis AGB-Kontrolle im unternehmerischen Geschäftsverkehr?', *ZIP* 2010, p. 310.
[1652] Pfeiffer & Schinkels 2001, p. 175-176.
[1653] See for example H.E. Brandner, P. Ulmer, 'EG-Richtlinie über miβbräuchliche Klauseln in Verbraucherverträgen', *BB* 1991, p. 706.
[1654] See further E. Von Hippel, 'Der Schutz des Verbrauchers vor unlauteren Allgemeinen Geschäftsbedingungen in den EG-Staaten', *RabelsZ* 1977, p. 244-245.

be reconciled with the aim of Directive 93/13 to harmonise national laws to advance the internal market?

Notably, however, the existence of a common principle does not necessarily have to lead to unification. Instead, it may a reason for the CJEU to leave discretion for national courts to assess the fairness of clauses in accordance with the general principle of good faith. This enables courts to evaluate clauses responsively as well as consistently with national law.

10.5.4. Principles underlying the development of the law on STC's: divergences

Some differences in principles underlying the development of the law on STC's by German and European actors may also become apparent. Generally, the deduction of legal principles from the *acquis* is much more controversial than deduction of principles from national laws that may moreover lend itself more easily for generalisation than the *acquis* with its functional, fragmented approach.

1) The development of the Directive is not based on individual consumers' position and it can be doubted whether it can be doubted whether a more general principle of the protection of weaker parties can be deduced from the Directive.

Frey[1655] points out that the aim of the Directive is not unequivocal as it also aims to further the internal market, and seeks to protect consumers because of their importance to the internal market, a view that has since frequently returned in other Directives in the private law *acquis*. It can moreover be doubted whether consumer protection in the Directive been based on a balanced analysis of the different positions of consumers vis-a-vis sellers – and other strong parties – throughout Europe, as the views on the weak position of consumers, and how to compensate for this weak position, if at all, may differ between as well as within Member States.

2) The *Richtigkeitsgewähr* can probably not be deduced from the *acquis*.

The Directive does not consider the use of STC's *as such* problematic, and neither does it stand in the way of the use of international model contracts. To the contrary, the EU has recognised the importance of STC's and sought to promote the use of EU-wide STC's. Although article 3 par. 1 limits itself to clauses that have not been individually negotiated, the Directive focuses on contracts between businesses and consumers and emphasises the unequal position of these parties, which may lead to unfair contract terms. Even if it is true that unfair contract terms may also be concluded between businesses, the reasoning in Directive 93/13 remains that businesses are in an equal position and thus do not merit special protection if one contract party is faced with STC's to his detriment.

The different approach towards STC's can also be illustrated by the 1990 proposal for a Directive that aimed to protect consumers in all contracts, also with regard to central terms of the contract. These suggestions met with widespread protest.[1656] Accordingly, article 4 par. 2 Directive excepts the main contract terms from the judicial evaluation under the Directive, which seems in accordance with the idea of *Richtigkeitsgewähr*, under which these main terms will fall as they have typically been individually negotiated. However, in *Caja de Ahorros*, the CJEU[1657] held that article 4 par. 2 did not limit the scope of the Directive, and Member States were accordingly free to provide more stricter protection to consumers by extending judicial control to the main terms of the contract. A.G. Trstenjak,[1658] in her conclusion, notes that it cannot be deduced from the legislative history of the Directive that the EU legislator wished to exempt these terms from judicial control as the main terms of the contract may well be unfair if they have been negotiated by parties in an unequal position.

[1655] K. Frey, 'Wie ändert sich das AGB-Gesetz?', *ZIP* 1993, p. 572.
[1656] See especially P. Hommelhoff, 'Zivilrecht unter dem Einfluß europäischer Rechtsangleichung', *AcP* 1992, p. 90-93.
[1657] CJEU 3 June 2010 (Caja de Ahorros), C-484/08, [2010] ECR, p. I-4785, par. 42-44.
[1658] A.G. Trstenjak before Caja de Ahorros, case C-484/08, [2010] ECR, p. I-4785, par.65.

Moreover, the difference in views may also explain the difference in the interpretation of these clauses. The objective interpretation of STC's in the German legal order is in accordance with the scope of terms that will often transcend individual contracts. In contrast, the Directive focuses on individual circumstances at the time of the conclusion of the contract, as the focus is on the protection of one party that may have been subjected to unfair terms because of his weak bargaining position, whereas German case law does not take into account the weak position of the consumer in assessing the fairness of a clause.[1659]

Furthermore, the *Richtigkeitsgewähr* can be seen in correlation with ideas of private autonomy, also protected within the sphere of article 2 GG, and the idea that private parties, acting in their own interests, should not be able to impose their terms onto contract parties in a way that will lead to *Fremdbestimmung*. Consequently, even if the idea of *Richtigkeitsgewähr* can be accepted at the European level, it does not have a similar connotation at a European level, and it may be doubted whether the value of the negotiating process is a leading concept in the development of the *acquis* or whether it is considered a useful concept that should be taken into account in the development of the internal market.

However, these differences do not mean that principles of the protection of weaker parties or the *Richtigkeitsgewähr* cannot provide starting points for debate. Moreover, as the *Richtigkeitsgewähr*, good faith and consumer protection partially overlap, the relevance of one principle need not mean that other principles may not play a role anymore in the development of the law.

10.5.5. Conclusion on principles underlying the law on STC's

The development of Directive 93/13 is not directly based on general principles, but the German ideas on justice have clearly influenced the Directive. Especially good faith can become a general principle that leaves room for national courts to evaluate clauses in a manner that is responsive to national legal views on justice, national practice and consistent with national law. In this way, general principles do not lead to unification. However, the question arises whether the CJEU also follows this approach in decisions after *Freiburger Kommunalbauten*.

Also, even if general principles can be discovered, this need not necessarily indicate in which direction the law will develop. The way in which good faith and consumer protection are weighed against one another and the rules developed on the basis of these principles may differ.

The question however arises whether Directive 93/13 allows for the development of the German law on STC's in accordance with the *Richtigkeitsgewähr*, especially in cases where the *Richtigkeitsgewähr* and consumer protection do not indicate a similar outcome, and the level of protection in the Directive is undermined. Yet in the German legal order, the principle of good faith, in the German legal order, seems inextricably connected with *Richtigkeitsgewähr*, which arguably offers a convincing analysis for subjecting STC's to judicial evaluation more generally.

This does not mean that the *Richtigkeitsgewähr* cannot form a starting point for interaction. To the contrary, European and foreign egilsators should seek to benefit from the well-developed ideas and the abundant amount of case law and research in the Germna legal order, without uncritically copying these ideas.

[1659] Hommelhoff, Wiedenmann, *ZIP* 1993, p. 568.

10.6. Conclusion on the development of the law on STC's through national techniques

Generally, in the development of the private law through codification, blanket clauses, and general principles, other actors also develop private law and, therefore, the ability of actors to safeguard benchmarks of predictability, accessibility, consistency and responsiveness through these techniques has been diminished. Because actors have not taken into account their dependence on other actors in ensuring that private law meets these benchmarks, they have not interacted with other actors accordingly, which has undermined the predictability, accessibility, consistency and responsiveness of European private law.

In the law on STC's, interdependence has clearly developed, which means that the extent to which actors can ensure the comprehensiveness of the law on STC's through the use of national techniques has become limited.

Particularly, this means:

1) The development of the *acquis* has limited the extent to which national actors may ensure the predictable, accessible, consistent and responsive development of the law on STC's in the BGB. Moreover, the extent to which codifications can deal with the development of international trade and treaties is limited.
2) The extent to which blanket clauses may contribute to the consistent and responsive development of the law on STC's has become limited because multiple actors have developed blanket clauses and other relevant measures, as well as international sources of law that may affect the interpretation of blanket clauses.
3) The extent to which general principles can contribute to the responsive development of the law on STC's is limited as different principles play a role in the development of the law on STC's at the national and the European level.

It follows that, theoretically, in order to ensure that the law on STC's develops in accordance with these benchmarks, actors must recognise interdependence and interact with each other accordingly. In particular, interaction between European and national state actors is necessary. Also, to ensure that the German law on STC's is in accordance with the needs of international trade, interaction between the German legislator and foreign legislators as well as non-state actors is necessary. Interaction between German courts, foreign courts, European actors and international actors is also necessary.

The German law on STC's is generally considered a success story. Does that mean that actors have recognised interdependence has developed and interacted accordingly, or not?

Paragraph 10.6.1. will consider whether this is the case in the implementation of Directive 93/13. Paragraph 10.6.2. will discuss the law on STC's and international trade and paragraph 10.6.3. will consider starting points for more and better interaction.

10.6.1. The law on STC's and the implementation of Directive 93/13

Actors have not recognised interdependence in the development of the law on STC's through national techniques. Notably, when the law on STC's developed, there was far less interdependence between actors than is currently the case. Actors have therefore not based their interaction with European and international actors on interdependence. Similarly, the development of the *acquis* and international trade has not prompted national actors to

reconsider the use of techniques. Accordingly, the *Schuldrechtsreform* has not prompted to legislator to critically consider whether the Directive was correctly implemented into German law, perhaps also because of the limited time of the law reform.

Nevertheless, **the German legislator and German non-state actors have actively participated in the development of the *acquis* at the European level**. This has prevented that Directive 93/13 diverged considerably from German law which would have necessitated far-going amendments. In that case, the decreased ability of national actors to safeguard the predictable, consistent and responsive development of the law on STC's would have been apparent. This was however not the case. **Thus, interaction has contributed to the consistent and predictable development of the law on STC's**, and it has been prevented that successful law that adequately handled national practice and was in accordance with national legal views on justice, would have to be adapted after harmonisation

Simultaneously, once harmonisation had been established, German actors exercise restraint in the implementation and application of the *acquis*, and in the interaction with European actors, perhaps also because they believed German law is already in accordance with European measures. However, European actors play an important role in the correct implementation and application of the *acquis*. Does the lack of interaction therefore not lead to problems?

This is not the case. National state actors very clearly prioritise safeguarding the predictability, accessibility, consistency and responsiveness of the law on STC's. Because of the problems in the quality of the private law *acquis*, and because of the well-established, successful AGB-Gesetz, national state actors may be even more inclined to take a defensive approach in which they limit interaction with other actors, especially if that might undermine the quality of the law on STC's.

In particular, interaction with the CJEU may have been limited because of the time involved in prejudicial questions, because of the need to ensure responsiveness to national legal views and national legal views on justice, and because of the need to ensure predictability and consistency, which may be undermined as CJEU decisions are not always easy to predict and usually not attuned to surrounding national private laws.

Moreover, referring to foreign decisions may be detrimental for accessibility as foreign law and decisions are not always sufficiently available to actors. Foreign decisions are moreover in accordance with foreign default law, which may diverge from German default law, and decisions following foreign decisions may therefore undermine the consistency of the law. Furthermore, foreign decisions may not always predictable. The use of foreign decisions may also be unpredictable and inaccessible considering the amount of possible relevant foreign decisions.

Thus, **the lack of interaction in the implementation and application of the *acquis* has maintained rather than undermined the quality of the law on STC's.**

The obligations of state actors are divided oddly: national state actors are focussed on the quality of the law on STC's and more broadly private law as such, **while European actors insufficiently consider this need**, even though not undermining these benchmarks is important for the extent to which the private law *acquis* effectively promotes the functioning of the internal market and enhances consumer protection.

However in the long term, the lack of interaction means that relevant questions have been overlooked in the attempted reform of Directive 93/13 and will likely continued to be overlooked.

These instances include:

i) The development of the law on STC's through *Sonderprivatrecht* or through codification. The reasons for the development of *Sonderprivatrecht* offer interesting starting points for debate and a more predictable, consistent approach to the implementation of the *acquis* may benefit these benchmarks.
ii) Questions on the allocation of competences between the CJEU and national courts in the interpretation of blanket clauses.

The restraint of the BGH can moreover be undermined if foreign courts refer questions to the CJEU on the allocation of the CJEU and national courts to interpret blanket clauses. If the CJEU considers itself competent, this would be problematic for predictability. However, the conclusion that the CJEU is competent to interpret blanket clauses, especially the conclusiont hat the CJEU is exclusively competent, can be very detrimental for the responsiveness of the law on STC's.

iii) Questions on the obligation of national state actors to implement the model list in the Annex to Directive 93/13.
iv) Questions to what extent the *Richtigkeitsgewähr* could and should continue to play a central role in the development of the law on STC's.

These oversights mainly undermine the consistent, predictable and responsive development of Directive 93/13. Missed chances to improve the Directive are unfortunate, as it makes little sense to maintain unpredictability and inconsistency.

The lack of interaction may eventually lead to a circle: Because of the lack of interaction, the reform of the Directive overlooks questions that are relevant for improving the Directive, and because of these oversights, the Directive is not improved. Consequently, national actors continue to exercise restraint in the implementation and application of the Directive. And so on, and so forth.

10.6.2. The law on STC's and international trade

Interdependence between national actors and international actors in developing the law on STC's in accordance with the needs of international trade **has also developed**.

Generally, the German legislator has rejected regulatory competition. Instead, the legislator has sought to draft an attractive regime in accordance with the needs of national practice. However, in international cases decided under German law, courts have recognised the added vaue of international materials and business practices, and to a lesser extent, foreign decisions. This approach to international cases contributes to the responsiveness of German law to international practice. Moreover, **the approach of the courts to international cases under German law enables the German legislator to maintain a predictable, consistent regime that is in accordance with national legal views on justice for national cases that is applied more leniently in international cases.**

Although it is not clear whether the German legislator has similarly actively participated in the drafting of treaties that it has entered into and ratified, it does not seem likely that the active approach has suddenly been abandoned. However, it may be more difficult to influence the drafting of treaties as more actors are involved in the drafting of treaties, while some treatioes have been drafted already and subsequently been entered into. However, **German courts have adopted restraint in interacting with international and foreign actors in the interpretation of treaties**. Reasons for this restraint may be the predictable and accessibility of the law. Moreover, the consistent referral to German materials has contributed to the consistent application of treaties within the German legal order. Nevertheless, similar restraint is not visible in international cases decided under German law.

The lack of interaction is problematic. It may diminish the responsiveness of international law, often drafted to facilitate international trade, to international business practices. Additionally, the lack of interaction of courts to foreign decisions and international materials may not be beneficial for parties who do not have much access to German materials. The lack of interaction may also undermine the extent to which parties can rely upon provisions in treaties or on easily available decisions, which is detrimental for predictability.

Moreover, the lack of interaction may undermine the predictable, accessible and consistent development of the law on STC's as relevant questions are not considered in the reform of law at the European level.

Relevant issues include

i) The overlap between European measures or European measures and treaties'
ii) The competence of German courts to set aside national mandatory law if it conflicts with international law
iii) The possibility for a future CESL to allow clauses, especially in consumer contracts, that are contrary to national mandatory law.

Because of the lack of interaction, these questions remain unresolved, and will likely not be addressed in the reform of Directive 93/13. **A circle of non-interaction could** therefore **develop**: As the Directive is not improved, actors continue to exercise restraint, because of which the Directive is not resolved.

10.6.3. More and better interaction?

It has been argued that the interaction between actors should be adjusted. Is this also the case for the law on STC's and if so, how should interaction be changed?

Arguably, the interaction between actors should serve to improve the quality of the law on STC's. Thus, interaction between national and European actors should make European actors aware of relevant questions in the implementation of Directive 93/13, for example if these problems are considered in soft law projects or academic research, and the need to maintain the comprehensibility of European private law. In turn, interaction should make German actors more aware of the use of techniques.

More interaction between German actors and European and foreign actors, or perhaps academics, could also draw more attention to the increasing number of Directives providing rules on STC's.[1660] If the legislator seeks to maintain the central role for the BGB, it may be worthwhile to consider in what ways the German legislator is to cope with the development of the *acquis* in this area, to prevent that the accessibility of the law of STC's is decreased as various separate laws provide incidental, separate rules that influence the law on STC's.[1661]

Possible conflicts between simultaneously applicable sources – such as the CISG and national law implementing the Directive [1662] as well as Montréal Convention and Directive,[1663] as well as the CISG, national law and Directive 2000/31[1664] may prompt actors involved in the development of the law to consider how these sources should be coordinated,

[1660] See previously par. 9.3.1.
[1661] Current course pursued in the implementation of these Directives, in articles 305-310 BGB. Perhaps reconsider the question whether the law in this area is stable enough to be included in the BGB, if it is continually being developed at the European level.
[1662] Especially LG Düsseldorf 11 October 1995, 2 O 506/94, at http://www.unilex.info/case.cfm?id=234.
[1663] Comp. BGH 1 February 2005, *NJW* 2005, 1774.
[1664] Comp. LG Gießen 31 July 2008, *BeckRS* 2009, 395 and

which may help to resolve these conflicts, which in turn should contribute to the consistent and accessible development of European private law.

Interaction between national, European and international state and non-state should serve to make German actors more aware of the possibility to make the German legal order a more attractive forum for the adjudication of disputes under international law.

However, **more interaction need not necessarily lead to deliberation if the approach of German and European actors does not change**. If national actors are mainly focussed on national laws, and European actors are not focussed at all on national laws, they pay less attention or even neglect the insights provided by comparative law as well as the European view, which may stand in the way of deliberation in the revision of Directive 93/13. Thus, the revision of the Directive is likely also, if not only, based on conflicting European, national and economic interests, rather than on rational arguments which course will lead to the most predictable, most consistent, accessible or responsive development of the *acquis* – the emphasis on these benchmarks may arguably also differ.

However, **if the future reform of the 1993 Directive were to take place in accordance with these suggestions, the legislative process might have to be considerably lengthened.** Processes at the European and the national level should be carefully coordinated to prevent unnecessary delays.

Yet some delay is preferable over future problems that may arise if a future Directive does not sufficiently take into account the needs and preferences of legal practice or national legal views on justice, which may entail that the law will be more quickly outdated, necessitating further reform, which is arguably also detrimental to the stable and consistent development of the law.

These possible starting points for more interaction between actors may well reinforce one another. Future CJEU decisions on the cases in which the Montréal Convention and the Directive overlap should be considered in the future reform of the Directive, which in turn may provide useful insights for the development of a future CESL.

10.7. The use of additional or alternative techniques

Actors involved in the development of the law on STC's have typically not recognised interdependence as such, and have therefore not consciously sought to mitigate the decreased extent of national techniques to ensure the comprehensibility of European private law through the use of additional or alternative techniques. However, usually, techniques are used in combination with one another, and additional and alternative techniques may well contribute to benchmarks of predictability, consistency, accessibility and responsiveness. Therefore, this paragraph will ask what techniques could be used in addition or instead of currently used techniques.

The narrow approach of both German and European state actors also has consequences for the use of additional techniques. Particularly, the limited view of actors increases the chance that actors will reject suggestions for the use of additional or alternative techniques that is not in accordance with their interests. Therefore, these possibilities will only be considered insofar as they are likely to contribute to benchmarks of predictability, consistency, accessibility and responsiveness of the law on STC's.

Furthermore, this chapter will not consider suggestions for the use of Regulations. These suggestions are not likely to meet with support as they may severely undermine the central role of the BGB. Regardless, they would not be considered as it is not clear how the use of Regulations would contribute to the comprehensibility of the law on STC's.[1665] Moreover, the use of the OMC may not be considered favourably by German actors if it aims to improve regulatory competition in this area. The success of the OMC depends on the willingness of actors to participate in it, which should not be assumed, while the weaknesses of the OMC may reinforce the shortcomings apparent in the debate on the reform of the acquis, including Directive 93/13.

Additional and alternative techniques that are likely to be rejected include the use of techniques that may lead to *Fremdbestimmung*, especially comitology, which has already been rejected by German actors.[1666] The development of guidelines by the European Commission can similarly be rejected and guidelines have moreover proven unsuccessful. Although the use of alternative regulation for the interpretation of blanket clauses may be problematic as it might lead to *Fremdbestimmung*, this possibility will nevertheless be considered. Courts have recognised added value of alternative regulation that may reflect business practices,[1667] as has also become visible in international cases[1668] as well as domestic cases.[1669] Taking into account well-established self-regulation – which is abundantly available in the German legal order[1670] – will contribute to the responsiveness of German law to national practices.

German actors may also be less receptive to suggestions for the study of STC's to identify barriers to the internal market, as this may reinforce the functional, fragmented

[1665] A Regulation would not necessarily undermine accessibility. Although consumers may not always be sufficiently aware of relevant Regulations, especially German consumers are likely to be aware of their rights because of the well-established national rules. The extent to which a Regulation would benefit predictability and consistency depends on the room left under a Regulation for national default law and model lists, and national case law, which so far have contributed to the predictable and consistent interpretation of article 307 BGB. It may be doubted whether judges, especially in relatively straightforward cases, will extensively consider soft laws, which they have not expressly done before, or foreign case law, especially if national case law is available. Moreover, the responsiveness of the law on STC's may be severely diminished if a Regulation does not leave sufficient room for the courts to evaluate clauses in accordance with national legal views on justice and practice, or the *Richtigkeitsgewähr*.
[1666] Comitology will be discussed in the subsequent chapter, as Dutch actors have not rejected this option.
[1667] BVerfG 9. 5. 1972 - 1 BvR 518/62 u. 308/64, *NJW* 1972, 1504, C 2.
[1668] See previously par. 10.5.3.1.4.
[1669] In particular in the area of insolvency administration, see previously par. 4.5.2.3.
[1670] Especially in the area of consumer sales law, see previously par. 4.5.3.4.

approach of the *acquis*, which makes it considerably more difficult to maintain the predictable, consistent and accessible development of private law within the BGB. However, these initiatives may also serve to make the law more accessible to foreign actors, and as German law has provided a successful set of rules, making German law more available may well be a way to increase the attractiveness of German law. Also, if the study leads to harmonisation, albeit fragmented, this may lead to more convincing initiatives and support for harmonisation and improve the quality of the *acquis*. It is desirable that German actors are prompted to reconsider their narrow view, especially if that happens in a way that does not diectly lead to harmonisation.

Conversely, European actors are likely to object to the use of model laws instead of currently used European measures, even if model laws will likely increase the quality of European private law. However, model laws will not contribute to the comprehensibility of the law on STC's as UNCITRAL has not established model laws or legislative guides for the laws on STC's. Possibly, considering existing initiatives of the ICC, less need was perceived for the development of such a model law. It can be doubted whether a model law could be developed sufficiently quickly to be taken into account in the reform of Directive 93/13.

Also, the development of collective bargaining between a limited number of Member States is likely to meet with European objections, as this may lead to a 'two-tier Europe'. In addition, the success of collective bargaining depends on the willingness of actors to participate, and this willingness should not be overestimated. However, German actors have considerable experience in collective bargaining and may be interested to engage in it if this would induce the judiciary to evaluate STC's less strictly. Moreover, the chances that a 'two-tier Europe is created may decrease as agreements are initially not transformed into equivalents of framework agreements, which may also take away objections of *Fremdbestimmung*.

This paragraph will follow the order in which the use of additional and alternative techniques was discussed in chapter 8. Accordingly, paragraph 10.7.1. will focus on techniques to support the legislative process. Paragraph 10.7.2. will focus on the development of the DCFR, and paragraph 10.7.3. will consider techniques to support the extent to which blanket clauses can contribute to comprehensibility. Paragraph 10.7.4. will analyse the possibility to study the use of STC's in cross-border trade. Paragraph 10.7.5. will consider the development of the CESL, paragraph 10.7.6. will turn to the introduction of collective bargaining and paragraph 10.7.7. will end with a conclusion.

10.7.1. Techniques to support the legislative process

The extent to which additional techniques used to support the legislative process could strengthen interaction is limited.

Impact assessments at the national level could draw more attention to the use of techniques and provide a valuable impetus for reconsidering the use of techniques. The development of national impact assessments would be consistent with Member States' calls for more empirical support for European measures. Respondents may also be prompted to consider impact assessments if comments based on the impacts of future initiatives are likely to be taken into account. However, German actors are not familiar with impact assessments for private law, which would moreover require that German actors recognise that Directive 93/13, and possibly, therefore, articles 305-310 BGB, like *Sonderprivatrecht*, aim to improve the internal market as well as consumer protection.

The use of consultations at the European and national level has not inhibited German actors from successfully participating in debate, which indicates that publications in journals and newspapers may also serve to prompt participation. However, participation of actors at the European level could still be improved. European or national actors might try to make use of well-established networks in order to prompt parties with valuable expertise and experience to participate, or participate more extensively, in European debate.

The use of databases on foreign law implementing Directive 93/13 and decisions are not likely to generate more referral to these sources. Currently, courts do not refer to foreign law in the implementation of the acquis, and foreign decisions are similarly not taken into acocunt in the adjudication of disputes under international regimes. hardly used despite databases. Perhaps, however, if German actors are more aware that this restraintmay inhibit the attractiveness of Germany as a forum to adjudicate disputes, this restraint might be reconsidered. However, even if the added value of foreign decisions is more concistently recognised, restraint may continue to be exercised in the implementation of the acquis because of potential problems with predictability, accessibility, consistency and responsiveness.

Interestingly, however, the improved use of databases may also encourage regulatory competition. Possibly, the increased accessibility of German case law could increase knowledge of German practice and provide insight into a well-developed legal system that could inspire both foreign legislators and foreign judges.

However, currently, recent BGH case law is already freely accessible,[1671] which foreign actors may not realise. Thus, Dutch judges, in decisions under the CISG, have consistently referred to one decision from the BGH, while surely, there are also other relevant decisions.[1672] Thus, merely making available case law may not suffice, as case law may prove less accessible than legislative provisions or commentaries. Perhaps, if databases are to provide information to not only German parties but also to foreign parties, the needs and prior knowledge of foreign actors may prompt actors to increase the accessibility of databases for these actors. Thus, for example, BGH decisions on the CISG, or BGH decisions on article 307 BGH could be made available in groups, accompanied, perhaps, by a short introduction. Importantly, foreign and European actors should be sufficiently aware of these initiatives in order to benefit from them.

Thus, the improved use of consultations and impact assessments may not strengthen the legislative process. However, the use of databases may assist the German legislator in attempts for regulatory competition in a way that does not require lowering standards of consumer protection or repeatedly amending the BGB.

10.7.2. The development of the DCFR

Currently, the DCFR does not sufficiently take into account parts of the *acquis* and national experiences, which may limit the extent to which the DCFR will contribute to the predictability, consistency, accessibility and responsiveness of the law on STC's. In comparison to other soft laws, however, the DCFR does provide a clear added value to the PECL and the UNIDROIT Principles.

[1671] See http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en&sid=ce31dc208856bd2b345fbc3471f1e593.
[1672] See par. 11.3.4.2.2.

Paragraph 10.7.2.1 will consider the DCFR and the private law *acquis*, and paragraph 10.7.2.2. will discuss the DCFR and national practice. Paragraph 10.7.2.3. will turn to other sets of soft laws and paragraph 10.7.2.4. will end with a conclusion.

10.7.2.1. The DCFR and the private law *acquis*

The drafters of the DCFR have diverged from relevant European initiatives, in particular Directive 93/13, which has undermined the extent to which the DCFR can contribute to the predictability, consistency, accessibility and responsiveness in the form of a "toolbox".

In some cases, the rules in the DCFR expressly take into account the *acquis*. Accordingly, article II – 9:102 et seq DCFR provides rules for pre-contractual statements that can be regarded as a contract term. The DCFR expressly refers to various national laws as well as Directive 99/44 on consumer sales as well as article 434 BGB. The rule in the DCFR is, in an amended form, mirrored in article 69 of the proposed Common European Sales Law.

However, the DCFR also diverges from the *acquis* in various respects:

i) The definition of STC's differs from the definition in Directive 93/13. Proposed article 30 of the consumer rights Directive did not follow the definition of the DCFR, but the CESL does reflect the definition of the DCFR.

The PECL, the UNIDROIT Principles and the DCFR similarly provide rules on general contract law and STC's. Interestingly, both articles II - 1:109 DCFR and 2.1.19 UNIDROIT Principles refer to standard terms as terms that are prepared in advance for repeated use and that are not individually negotiated with other parties. Interestingly, the DCFR expressly refers to Directive 93/13, but does not refer to German law.[1673] The DCFR moreover diverges from 2:209 par. 3 PECL that refers to terms that have not been individually negotiated and that 'have been formulated in advance for an indefinite number of contracts, which it rightly considers as too strict.[1674]

Notably, Directive 93/13 does not require that terms have been drafted for multiple contracts, and the German legislator accordingly amended article 310 par. 3 BGB to ensure that STC's that were only used once in consumer contracts would also be subject to judicial evaluation.[1675] Interestingly, article 30 of the proposal for a Directive on consumer rights referred to terms 'drafted in advance by the trader or a third party, which the consumer agreed to without having the possibility of influencing their content'. Although this definition does emphasise drafting terms in advance, it also does not require that terms are drafted for multiple contracts. Yet article 2 sub d of the Regulation proposing a CESL defines standard contract terms as 'contract terms which have been drafted in advance for several transactions involving different parties, and which have not been individually negotiated by the parties within the meaning of Article 7 of the Common European Sales Law'. Accordingly, article 7 of the proposed Common European Sales Law also provides that contract terms are not individually negotiated 'if it has been supplied by one party and the other party has not been able to influence its content'.

The DCFR also diverges from Directive 93/13 by not expressly exempting the main terms of the contract from the definition of standard contract terms. The debate preceding Directive 2011/83 however shows that this distinction is important for German actors.[1676] Unfortunately, article 7 of the proposed Regulation also does not make this distinction.

ii) The test of unfairness in the DCFR differs from Directive 93/13.

[1673] DCFR, Part I, p. 164.
[1674] DCFR, Part I, p. 160.
[1675] MuchKomm/Basedow (2012), article 310, nr 67.
[1676] See previously par. 10.3.2.4.

Article II – 9: 403 DCFR stipulates that a clause in a consumer contract is unfair if it significantly disadvantages the consumer, contrary to good faith. According to the comments,[1677] this wording implies that the test should not be extended to the main contract terms, which however could have been remedied by exempting the main terms of the contract from judicial evaluation. It is moreover not necessary, as article II – 9: 406 par. 2 DCFR provides that the main terms of the contract are exempt from the unfairness test. A similar exception would also have been desirable for article 9:405 that defines 'unfair' terms in business contracts, which, as such, is controversial enough as is. Accordingly, this change has not been followed in article 83 of the proposed Common European Sales Law.

Also, the DCFR does not resolve inconsistencies visible in the private law *acquis*. For example, article II- 9: 103 DCFR stipulates that parties must have taken reasonable steps to make the other party aware of the provisions, and if a contract is concluded electronically, if STC's are made available in "textual form", which, according to the comments, includes the 'presentation of terms on an internet site in such a way that they can be downloaded, stored and printed by the other party'. This rule is in accordance with article 10 par. 3 Directive 2000/31, to which the DCFR accordingly refers, as well as article 23 Regulation Brussels I, which more clearly sets out the strict requirements for the inclusion of jurisdiction clauses.[1678] Unfortunately, however, the DCFR does not consider article 22 par. 1 sub f and par. 2 Directive 2006/123 that in contrast stipulate that service provides may be provided in various ways, depending on the preference of the provider.[1679]

Notably, if the DCFR is to act as a "toolbox", it could be of clearly added value to draw attention to inconsistencies such as this, which unfortunately is not the case. Interestingly, article 6 par. 8 Directive 2011/83 however stipulates that the requirements in the Directive should complete the requirements in Directive 2006/123 and Directive 2000/31, while Member States should retain the possibility to impose additional requirements on service providers. However, if the provisions conflict with the requirements of the Directive, the provisions in the Directive prevail. Article 6 does not expressly include STC's, but terms often included in STC's, such as clauses on the extension of the contract as well as conditions and rights with regard to after-sale services and out-of-court redress.

Other rules and comments in the DCFR have also not been followed. The comments to article II – 9:103 DCFR[1680] expressly refer to usages that may entail that parties are bound to terms not made available to him directly, but made available generally by stakeholder or international organisations. This referral seems at odds with the BGH decision with regard to the obligation of users of STC's to make their STC's sufficiently available, but in accordance with decisions of the BGH under German law in which the use of terms was found to be well-established, and parties should assume that their contract party wanted to include these clauses in their contracts.[1681] Oddly, these rules have not been reflected in the proposed CESL that does not appear to provide separate rules for making STC's adequately available to one's counterparty. Arguably, this is an important gap that should be dealt with before a CESL is enacted.

In some respects, the DCFR may provide a clearly added value. It may be of added value to existing soft laws because of the specific rules on unfair terms in articles II – 9:401 et seq DCFR, as the UNIDROIT Principles and the PECL that do not provide specific rules

[1677] DCFR part 1, p. 634-635.
[1678] However, the comments and notes to article II – 9:409, DCFR, Part I, p. 660-661 do expressly consider CJEU decisions.
[1679] These ways include the possibility for the provider to provide the information on his own initiative, making the information easily available in places where the contract is concluded, by making the text of the STC's easily available online, or by including the STC's in general information documents provided by the seller.
[1680] DCFR, Part I, p. 591.
[1681] See above par. 10.3.3.2.2.

on unfair terms. Also, the comparative overview provided by the DCFR[1682] could be helpful for future reform of the 1993 Directive. According to the comments, these rules are modelled on Directive 93/13 and may go beyond the protection conferred on consumers by the Directives. Accordingly, article II – 9: 402 par. 2 DCFR provides that a term in a consumer contract that is not transparent may be unfair for that reason alone, which has not been followed in article 83 of the proposed Common European Sales Law.

Thus, in various important respects, the DCFR diverges from the *acquis*, and in some cases, the DCFR has – rightly so – not been followed. In some cases, the DCFR should be followed, in particular with regard to business practices and the sufficient availability of STC's. In other cases, such as the definition of STC's, following the DCFR is problematic and should be reconsidered.

10.7.2.2. The DCFR and national practice

The drafters of the DCFR have not adequately taken into account questions arisen in national practice, which has undermined the added value of the DCFR for national and European actors.

Unfortunately, the DCFR does not address the question whether clauses can be upheld if judges interpret them leniently,[1683] or whether model contracts should fall within the scope of the Directive.[1684] Moreover, compliance with article 1 par. 2 Directive that exempts clauses in accordance with applicable national default law or international law has been problematic in the German legal order.[1685]

Notably, the comments to article II – 9:406 DCFR,[1686] although they expressly refer to the exemption of clauses in accordance with the Warsaw and subsequent Montréal Convention, do not refer to BGH decisions that contradict these decisions, even though these decisions may indicate problems for the CESL.[1687] Moreover, neither the comments nor the notes to the DCFR,[1688] in discussing 'unfairness' in article II – 9:403 DCFR pay attention to the question which court should be competent to interpret the DCFR. Yet this question has been debated,[1689] and the BGH[1690] does not seem particularly inclined to consider the question whether the CJEU is competent to provide guidelines for the interpretation of national law implementing article 3 Directive.[1691] The notes, though referring to the principle of good faith in German law, do not discuss the *Richtigkeitsgewähr*. Admittedly, the *Richtigkeitsgewähr* has been criticised[1692] and shows considerable overlap with good faith,[1693] but it still provides an interesting notion for justifying the binding force of

[1682] For example with regard to the implementation of the Directive, DCFR , Part I, p. 637-638.
[1683] MunchKomm zum BGB/Basedow (2012), article 306 nr 28-29.
[1684] This is the case in German law, see MunchKomm/Basedow (2012), article 305, nr 13, 18-19, 21, while this has been debated in Dutch law, without however considering the Directive, see See for debate on this question on the one hand R.H.C. Jongeneel, 'Vallen door een ander dan partijen opgestelde algemene voorwaarden onder afd. 6.5.3.?', *WPNR* 6027 (1991), who held that model contracts do not fall under (then) the AGBG, and on the other hand J.H.M. van Erp, 'De NVM-koopakte: géén algemene voorwaarden', *WPNR* 6190 (1995).
[1685] See previously par. 10.4.3.2.
[1686] DCFR, Part I, p. 647.
[1687] BGH 1 February 2005, *NJW* 2005, 1774. See further previously par. 10.4.3.2.
[1688] DCFR, Part I, p. 634 et seq.
[1689] See Staudinger Kommentar zum BGB/Coester (2006), article 307, par. 70-71.
[1690] Comp. BGH 14 July 2004, *BeckRS* 2004, 7903, see further previously par. 10.4.1.2.
[1691] See further for this argument below, par. 10.4.1.1.
[1692] See prominently L. Raiser, 'Vertragsfunktion und Vertragsfreiheit', in: E. von Caemmerer, E. Friesenhahn, R. Lange (eds.), *Hundert Jahre deutsches Rechtsleben, Festschrift zum hundertjährigen Bestehen des Deutschen Juristentages, I*, Muller: Karlsruhge 1960, p. 118.
[1693] Notably, the *Richtigkeitsgewähr* is absent for STC's as they have not been negotiated, which gives the user of STC's the opportunity to improve his legal position to the detriment of his counterparty. This may however be contrary to good faith, which requires the user of STC's to take into account the legitimate interests and expectations of his counterparty. See further previously, par.10.5.1.

contracts and it may therefore also be interesting for foreign and European state actors and academics.

10.7.2.3. The DCFR and other soft laws

The DCFR provides specific rules on STC's that are not reflected in other soft laws, and the DCFR might have had a cear added value for the development of the CESL and the revision of Directive 93/13. Yet in cases where other soft laws have also developed rules for STC's, divergences from and between the different sets of soft laws have not been adequately explained. Arguably, explaining divergences from other sets of soft law doing so may provide legislators and courts with arguments for preferring or not preferring a particular set of rules, which would have improved the accessibility of European private law.

In some cases, the rules in the DCFR largely converge with other soft laws, such as article II – 4: 209 DCFR that closely resembles article 2:209 pars. 1 and 2 PECL. The provisions also resembles article 2.1.22 UNIDROIT Principles. Yet although the Comments note that the DCFR has followed the UNIDROIT principles in this respect, it is not mentioned that differently from the UNIDROIT Principles, the DCFR – as well as the PECL – stipulates that no contract is formed if a party has indicated in advance that it does not intend to be bound, not by way of standard terms.

Various differences between the DCFR, the PECL and the UNIDROIT Principles are not explained further:

i) The different rules on formation of contract and the inclusion of clauses in contracts if one party's clauses reject the applicability of the other party's clauses

According to the comments, 'experience' has shown that parties that include clauses in their contract that stipulate there is no contract unless their own terms apply subsequently act in accordance with the contract. Thus, the comments find, to uphold these clauses while parties perform the contract, 'would erode the rule'. The present rule in the DCFR, followed in article 39 proposed CESL, leaves open the possibility that both parties have included these clauses in their contract and subsequently performed the contract, for which situation the solution preferred by the DCFR does not become apparent. The DCFR also refers to the CISG. Articles 18 and 19 CISG also provide rules for battle of forms, and similarly provides that parties need to object orally or by sending notice, which implies that objection cannot take place through STC's. As the DCFR in this respect follows the CISG rather than the PECL or the UNIDROIT Principles, reasoning that indicates why the CISG provides the better rule would have been welcome, and should moreover be easily available considering the database of case law on the CISG.[1694] It would also have been interesting to consider the question whether clauses in battle of forms cases can nevertheless be included because the use of these clauses represents well-established commercial practices, for example with regard to retention of title clauses.

Moreover, differently from the PECL and the UNIDROIT principles, article II – 4: 209 DCFR, followed in article 39 proposed CESL, requires that parties inform the users of STC's about their lack of willingness to be bound with undue delay, which is reminiscent of article 19 par. 2 CISG. The DCFR does not elaborate on this additional requirement, which may however leave additional room for arguments. If the notes had more extensively referred to CISG case law, more clarity could have been provided.

ii) Different rules on individually negotiated and standard merger clauses

[1694] See critically on the rule provided by the CISG P. Schlechtriem, 'Battle of Forms in International Contract Law, Evaluation of approaches in German law, UNIDROIT Principles, European Principles, CISG; UCC approaches under consideration', http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem5.html.

Article II – 4:104 DCFR distinguishes between individually negotiated merger clauses and merger clauses that have not been individually negotiated. A similar rule can be found in article 2:105 PECL. Although the DCFR, according to the comments, follows article 2.1.17 UNIDROIT Principles, this provision does not make a similar distinction, nor does the added value of this distinction become convincingly apparent. Although the DCFR points out that merger clauses that have not been individually negotiated be unfair in consumer contracts, according to the indicative European model list, this does not mean that such a distinction is useful for merger clauses; notably, if it is individually negotiated, it should not be subject to judicial evaluation as it is not a clause that has not been individually negotiated in the sense of article II-1:109 DCFR. It is probable that national laws also have not made a distinction between negotiated and non-negotiated merger clauses for similar reasons.

The distinction in the DCFR is also not followed in article 72 of the proposed CESL, which has instead opted to provide more protection to consumers by simply stipulating in article 72 par. 3 Draft CESL that in a B2C contract, a consumer is not bound to a merger clause. However, the comparative overview in the note may provide valuable information for the further development of the proposed CESL.

iii) Different rules on clauses for form requirements

Article II – 4:105 DCFR stipulates that clauses imposing form requirements on modification or termination of the agreement only result in a presumption, in accordance with article 2:106 PECL, but contrary to article 2.1.18 UNIDROIT Principles. According to the DCFR, this rule is in accordance with most of the laws of the Member States, but it has not been reflected in the proposal for a Common European Sales Law.

Arguably, diverging from other sets of soft law is not, as such, problematic, but more explanation on the differences could have made clear why the DCFR differs from the PECL and the UNIDROIT Principles, which would have improved accessibility and provided an explanation for actors looking to the different set of soft laws for inspiration in the drafting of legislation or the adjudication of disputes.

10.7.2.4. Conclusion on the DCFR as an additional technique

The divergences between the *acquis* and the DCFR may limit the extent to which the DCFR can contribute to a more predictable, consistent development of the *acquis*, as well as the consistent implementation of the *acquis*.

Also, the lack of attention for national experiences in the implementation of the *acquis* limits the extent to which the DCFR adequately responds to problems or lack of clarities that have become visible in practice. Not addressing these questions also limits the extent to which the DCFR supports the predictability of the *acquis*.

Moreover, notwithstanding the clearly added value of specific rules on STC's in the DCFR, the lack of attention for divergences between the DCFR and other soft laws has lessened the extent to which the DCFR improves the accessibility of European private law.

10.7.3. Techniques in addition to blanket clauses

The use of alternative regulation may contribute to the responsive interpretation of blanket clauses, which will be considered in paragraph 10.7.3.1. Moreover, the development of the German law on STC's reveals that lower regulation may also play a role in the interpretation of the law. This will be discussed in paragraph 10.7.3.2. Paragraph 10.7.3.3. will end with a conclusion.

10.7.3.1. The use of self-regulation

Well-established self-regulation in the area of consumer sales may contribute to the predictable and consistent interpretation of blanket clauses. Taking into account conduct rules expressly recognised by users of STC's may moreover be in accordance with consumers' expectations.

Arguably, the use of alternative regulation may especially be indicated in cases where contract parties should be able to exercise constitutional rights without undue interference from either European or national state actors, although it should be noted that European actors may view self-regulation differently than German state actors. The use of self-regulation in the interpretation of blanket clauses may however bring about problems of *Fremdbestimmung*, especially in cross-border cases where both parties have not consented to self-regulation. Moreover, the success of this option also depends upon the existence of well-established self-regulation.

Yet if successful self-regulation has developed, as is the case in the area of consumer sales,[1695] it may be relevant for parties that have recognised self-regulation. Thus, rules developed in apparently successful self-regulation are not imposed on actors that have not recognised self-regulation, including foreign actors.

However, if actors have recognised self-regulation that provides clear rules of conduct that have subsequently be breached by the seller, it seems consistent to consider these rules, although cases where this has happened are rare.[1696] Arguably, taking into account codes of conduct and other self-regulation may also be in accordance with article 6 Directive 2005/29 that stipulates that non-compliance with codes providing clear rules of conduct that the seller has expressly complied with may constitute a misleading commercial practice. Notably, self-regulation can be a relevant factor; the question whether a clause is unfair may also depend on other factors.

10.7.3.2. The use of lower regulation

The extent to which lower regulation may contribute to the predictability, consistency, accessibility and responsiveness may be limited.

Possibly, the choice of the legislator to implement Directives into the BGB could be combined with a choice to implement more detailed provisions outside the BGB, in lower regulation.[1697] This option may be particularly interesting if Directives that do not provide rules for private law as such, contain rules affecting the interpretation of STC's.

Thus, provisions on information duties and withdrawal periods would be stipulated outside the BGB, which will facilitate maintaining the abstract approach of the BGB. In addition, concepts that are not easily reconcilable with principles underlying the BGB – especially withdrawal periods – do not have to be inserted within the BGB, which may help to preserve the logical structure of the BGB. In addition, placing these provisions outside the BGB would make the European background of these provisions more apparent.

[1695] This concerns the the trustmark '*Geprüfter online shop – Bundesverband des Deutschen versandhandlers*' (see further http://www.bvh.info/bvh/leistungen/guetesiegel/?no_cache=1&sword_list[0]=g%C3%BCtesiegel, as well as the s@ser shopping trustmark for online shopping (see http://www.safer-shopping.de/qualitaetskriterien.html.) and the Trusted Shops trustmarks (see http://www.trustedshops.de/guetesiegel/kaeuferschutz.html). See further previously par**.** 4.5.3.4.

[1696] Comp. LG Düsseldorf 22 June 1995, *BeckRS* 2011, 7145, a case on the appraisal of a company to be sold where the court in passing refers to professional rules of conduct

[1697] Similarly P. Hommelhoff, 'Zivilrecht unter dem Einfluβ europäischer Rechtsangleichung', *AcP* 1992, p. 86.

Accordingly, the use of lower regulation has been used in the implementation of Directive 2000/31 on e-commerce. Accordingly, article 241 EGBGB initially enabled the Ministry for Justice to establish regulation on the information duties of several Directives, which led to the *BGB-Informationspflichten-Verordnung*. Although the regulation still contains provisions on the information duties of tour operators, article 3 of the regulation implementing article 10 par. 3 Directive has since been revised, and currently this article has been implemented in articles 246 par. 3 EGBG and article 312g BGB.

After the revision of Directive 87/102 on consumer credit, the German legislator [1698] reconsidered its course as it found that lower regulation failed to provide sufficient predictability to contract parties and left too much discretion to the courts to undermine the use of models for information duties of the seller.[1699] Yet detailed provisions on information duties should also not be included into the BGB, as this would be difficult to reconcile with the abstract approach of the BGB. Consequently, article 246 par. 3 EGBGB now implements the detailed provisions, alongside other detailed information provisions from other Directives, in addition to article 312g BGB and article 675a BGB.

Consequently, it is thus unlikely that if the German legislator will use lower regulation to provide models that enable sellers or suppliers to meet information requirements.
Several other objections may also arise:

1) The use of lower regulations leads to the development of a large amount of regulations alongside the BGB, which may undermine accessibility and consistency.

This development should be kept to a minimum, to prevent that in cases where multiple Directives are simultaneously applicable, provisions in the BGB as well as provisions in several regulations are applicable, which may undermine accessibility and consistency. Keeping the amount of lower regulation to a minimum may however not be an easy task as the *acquis* continues to develop.

Also, especially if provisions in lower regulations concern important parts of private law, the effort to maintain the central role of the BGB is undermined.

2) The development of lower regulation may make the reform of law considerable more complicated.

The revision of a Directive would necessitate not only the amendment of the BGB but also surrounding, simultaneously applicable regulations. Currently, the additional implementation of Directives in the EGBGB depends on the application of provisions in the BGB, while it also allows for a more ordered implementation of information duties. However, the additional implementation of Directives into the EGBGB is also a complicated system that is not easy to comprehend, especially for consumers seeking to enforce their rights.

3) Questions whether the use of lower regulation sufficiently implements Directives may also arise.[1700]

►The use of lower regulation will hinder rather than help accessibility, while it likely will not contribute to the predictable and consistent interpretation of blanket clauses. These problems may be difficult for the German legislator to compensate as the *acquis* continues to develop.

[1698] BT-Drucks. 16/11643, p. 66, 69. Notably, article 246 par. 3 EGBGB is only indirectly applicable, if article 312g BGB refers to it.
[1699] See for example LG Koblenz 20 December 2006, *BeckRS* 2007, 34 which held that information provided in accordance with the model provided by the regulation was not in accordance with article 312 BGB and therefore invalid.
[1700] CJEU 19 October 1987 (Commission v The Netherlands), case 236/85, [1987] ECR, p. 3989, par. 4.5.2.6.

10.7.3.3. Conclusion on the use of techniques in addition to blanket clauses

Well-established self-regulation may contribute to the predictable, consistent and responsive interpretation of article 307 BGB, whereas lower regulation is not likely to do so, as the courts have not sufficiently taken lower regulation into account. This does however not mean that the use of lower regulation may not be interesting for other legal orders where courts are less likely to ignore lower regulation, such as the Dutch legal order.

The question arises whether the courts, despite the recognition of the added value of well-established self-regulation and despite encouragement to look at self-regulation, would continue to exercise restraint in referring to self-regulation.

10.7.4. Studying the use of STC's

The study of the use of STC's focusses on the study of the use of STC's in international trade, comparative research on the interpretation of these clauses, and comparative research on model lists throughout the Union. These initiatives may contribute to the responsiveness of the *acquis* and may make national laws more accessible and predictable to foreign parties. Improvements are possible in the following ways:

1) Comparative research on clauses converging with national default or mandatory law could draw attention to generally accepted or rejected clauses and point to possible differences between clauses in different Member States. In turn, this information could be useful in the revision of Directive 93/13, in particular article 1 par. 2 Directive.

2) Comparing the approach to the interpretation of contracts, model lists, and the evaluation of clauses in contracts may provide more insight in the question whether and if so which divergences in private laws may constitute barriers to cross-border trade and improve the accessibility and predictability of national law for foreign parties.

Differences and similarities in model lists throughout the Union could form a starting point for discussion about the interpretation of article 3 Directive. Thus, the different approach towards clauses silently extending consumer contracts for a considerable length could be discussed.[1701]

Possibly, comparison might make the added value of the use of national default law in the evaluation of clauses more apparent, and indicate which provisions are merely established to provide order rather than provide a normative viewpoint, which in turn would make clear from which default provisions parties can diverge without further problems. Comparing model list may also include comparing the influence of these model lists on clauses in business contracts.

►The study of the use of STC's may increase the responsiveness of the *acquis* and the accessibility and predictability of the law for parties engaged in cross-border trade, provided that information resulting from these studies is clearly organised and does not lead to information overload, while parties should also be aware of these initiatives.

10.7.5. Optional regimes: the CESL

It is not clear whether the proposal for a future CESL will may contribute to the predictability, consistency, accessibility and responsiveness of the law on STC's.

[1701] See further previously par. 10.4.2.3.2.. The case law on the silent extension of contracts concerns established BGH case law, see already BGH 29 April 1987, *NJW* 1987, 1012, followed by OLG Hamm 8 April 2010, *BeckRS* 2010, 2083110.

The extent to which the CESL contributes to these benchmarks this depends on the adoption and the success of the CESL. In turn, this depends on the question whether it provides more predictability and consistency than well-established national regimes, while questions with regard to possible overlaps should also be addressed. The support for the CESL with regard to consumer contracts will also depend on the level of consumer protection envisaged by the CESL, in particular the question whether the CESL allows for circumventing mandatory law to the detriment of the consumer.

Problems of predictability, consistency and accessibility may however arise as the BGH has rejected to uphold clauses contrary to articles 305-310 BGB, even if they are in conformity with, for example, the Montréal Convention. Predictability may be undermined as it is not clear what sources may be used in the interpretation and evaluation of STC's. Possibly, the development of the CESL might theoretically prompt the CJEU to develop clear guidelines on the interpretation and evaluation of clauses under the CESL, which could contribute to the consistent and therefore more predictable interpretation and evaluation of clauses throughout the Union, provided that the methods indicated by the CJEU are acceptable for national legislators and judiciaries.

Moreover, the extent to which the CESL contributes to the responsiveness of the law on STC's may be severely diminished because judges, in the evaluation and interpretation of clauses in contracts falling under the CESL, likely may not refer to already developed case law.

10.7.6. Collectively negotiating STC's for cross-border trade

It is not clear to what extent encouraging collective negotiations for cross-border trade will be beneficial for the predictability, consistency, accessibility and responsiveness of the law on STCs.

Possibly, collective bargaining can be accomodated in the *acquis* by including, in future reformed Directives, that parties can diverge from mandatory law through collectively negotiated STC's, creating so-called "three-quarter mandatory law" at a European level.

An important condition for this option is that criteria of representativeness, transparency and inclusiveness are met. As national actors are better placed to assess the representativeness of stakeholder groups involved in collective bargaining, sufficient discretion should be left to national actors to ensure that these criteria are met.

Moreover, negotiations should take place between well-established parties with equal bargaining positions. The role of national actors in evaluating whether parties are sufficiently representative should prevent that collective negotiations take place between carefully selected 'repeat players' at the European level rather than relevant stakeholders, which may also be problematic as these negotiations may well lead to *Fremdbestimmung*.

Agreements negotiated in collective negotiations in accordance with these criteria may subsequently be collected in a database. The participation of representive actors, as well as networks and possibly publications in well-established journals and newspapers could increase actors' awareness of these possibilities.

Possibly, inserting three-quarter mandatory law in a revosed Directive 93/13, a revised Directive 99/44 or the proposed CESL would allow for the development of the law in accordance with the needs and preferences of legal practice in a manner that does not breach consumer protection. Such initiatives may also be in accordance with the prominent role of parties in some legal orders. Furthermore, the possibility to diverge from provisions may encourage users of STC's to enter into negotiations in which STC's may be negotiated

in accordance with consumers' preferences as well, which may reduce the amount of one-sided STC's more generally.

However, the success of these initiatives depends on the willingness of actors to enter into negotiations. If collectively negotiated STC's are subjected to less intense judicial control, parties may have more incentives to engage in cross-border trade. Particularly in legal orders where collective negotiations have already been established, actors may be interested.

Furthermore, more generally, the introduction of three-quarter mandatory law may also further complicate the development of the private law *acquis*.

Thus, although successful collective negotiations may well contribute to the comprehensibility of the law on STC's, this depends on the acceptability of this option for European and German actors and the willingness of actors to participate.

10.7.7. Conclusion on the use of additional and alternative techniques

What techniques in addition to or instead of currently used techniques are likely to contribute to the predictability, accessibility, consistency and responsiveness of the law on STC's?

Techniques that may be successful are the development of databases to make actors more familiar with foreign law, the use of alternative regulation in the interpretation of blanket clauses, and the study of STC's in cross-border trade.

In contrast, it is difficult to predict to what extent the development of the CESL and the introduction of collective negotiations will improve the predictability, consistency, accessibility and responsiveness of the law on STC's. The use of lower regulation will more likely decrease than increase the quality of private law.

These suggestions for additional and alternative techniques may well overlap and reinforce one another. Thus, the study of the use of STC's may support the development of an optional instrument or the introduction of collective bargaining on STC's in cross-border trade.

The narrow view of actors in the European debate may affect the use of additional techniques. Arguably, because of the interest-based approach of actors towards the debate, actors are less receptive to suggestions for the study of STC's to identify barriers to the internal market. National actors may especially reject these options if they increase the chance that the *acquis* develops differently than national law.

The limited view of actors may also mean that actors are less open to insights from databases and comparative research. This is unfortunate, as these techniques may support the quality of the *acquis*, which is in need of improvement, while the use of datanases may increase the responsive interpretation of international law.

It is also unfortunate that actors cling to the use of national techniques and do not pay sufficient attention to the development of additional or alternative techniques that could support the use of these techniques. The lack of attention for the combination of techniques can moreover be contrasted with the development of national law, where various techniques where combined with each other. Possibly, the use of combination of tehciques as such was not cosndiered as such in the development of national law – actors merely made use of structures that they were already familiar with. Yet as the development of the law on STC's becomes more complicated, more attention to combinations of techniques is necessary, as demonstrated by various alternatives that could strengthen the law on STC's.

However, especially additional techniques are often bottom-up techniques. Initiatives for these techniques are sufficiently available. However, it is also not clear to what extent the

use of bottom-up techniques will actually benefit the law on STC's as the willingness of actors to participate in these initiatves is difficult to estimate.

10.8. Conclusion

The German law on STC's is often considered a success story. Despite interdependence that has become visible in this area, however, the success of German law cannot be traced to German actors' awareness of interdependence or the careful use of techniques and careful interaction because of that interdependence.

Arguably, the success of the law on STC's can be contributed to several factors, not in the least the careful drafting process of the AGBG and the careful way in which courts have further developed the law in this area, without however interacting extensively with international or European actors. That does not mean that the extent to which national techniques may ensure the quality of the law on STC's has not been diminished. This has also become visible from the criticism on the reasoning for incorporation in the *Schuldrechtsmodernisierung*. However, in this area, Directive 93/13 largely converges with German law on STC's, and interdependence is therefore less visible. Accordingly, the relatively stable and consistent development of the AGBG and subsequently articles 305-310 BGB may also be attributed to the active participation of German actors to the European debate. The succes of the law on STC's may have further limited the German legislator's willingness to (re)consider the use of techniques. German actors may participate less actively in debate if in areas where German law is less well-developed or successful; in these cases, German actors may have less interesting insights to offer in European debate, and it is not unlikely that the *acquis* will be developed differently from German law. In these cases, the predicatble and consistent development of the law may be undermined.

However, the lack of interaction has severely undermined the predictable, consistent, and responsive development of Directive 93/13. The lack of interaction has also limited the responsive, consistent and predictable development of the law on STC's in international cases. Accordingly, German law is generally not considered successful in international trade. However, this unattractiveness is usually attributed to the strictness of German law, a bias that should be reconsidered.

Thus, the coexistence of actors is not directly problematic for private parties. However, it may be doubted whether an approach aimed at maintaining the development of the law on STC's in a manner similar to the development of laws before the introduction of Directive 93/13, as well as other Directives, will in the long term safeguard the consistent, predictable and responsive development of the law. Rather, the coexistence of actors in this area could be used as a starting point to consider the development of the law on STC's in a way that benefits from the insights of multiple actors, as has already been recognised when comparative law is used in the drafting of legislation. Maintaining a defensive approach may overlook future difficulties and possibilities to improve the law on STC's.

Particularly, the ongoing development of the *acquis* increases the chance that multiple and possibly inconsistent Directives will develop that will affect the law on STC's. The German legislator is not able to remedy these inconsistencies outright but instead has to implement them, though not necessarily within the BGB. Eventually, despite the BGB, private law may be developed less predictably, consistently, and accessible.

Currently, because the German legislator does not recognise the diminished ability of the BGB to contribute to predictability, accessibility, consistency and responsiveness, and it will logically not likely be compensated. Encouraging national practitioners, experts and

judges to participate at the European level seems promising as these actors may be more aware of the need for consistent and predictable decisions as well as national law with which future harmonisation measures should be developed consistently. Also, more and better debate at the European level also increases the chance that important decisions on the competence of courts to interpret blanket clauses are the outcome of extensive debate rather than a judicial decision.

Since neither German nor European actors have recognised interdependence, the use of additional or alternative techniques to compensate for these weaknesses have not been established, which is detrimental especially for European measures. The nature of European measures to pursue a particular aim should moreover prompt the European legislator to consider the use of techniques more critically. However, the limited view of both German and European actors makes it unlikely that drastic changes will be affected in the use of techniques in the short term. This is also unfortunate, as this makes it more likely that a circle of a lack of interaction, missed opportunities to improve the law, and a lack of interaction will develop.

Thus, the changes suggested in this chapter are long term and do not imply an immediate change of law, although the reform of the 1993 Directive on unfair contract terms is likely forthcoming. Rather, the changes include recognising interdependence, overcoming potential problems that may arise from interdependence, and where possible, benefitting from the insigths form other actors involved in the development of the law on STC's. It is submitted that in the long term, such an approach is more likely to contribute to the comprehensibility of the law on STC's than the current approach.

Chapter 11: The development of the law on *algemene voorwaarden*

11.1. Introduction

This chapter will ask whether the extent to which the Dutch law on STC's meets benchmarks of predictability, consistency, accessibility and responsiveness can be traced to actors' recognition of other actors' initiatives and the interaction between these actors.

Paragraph 11.2 will provide an introduction on the law on STC's, and paragraph 11.3. will turn to the development of the law on STC's through the BW. After that, paragraph 11.4. will discuss the use of blanket clauses. Paragraph 11.5. will analyse the use of general principles. Paragraph 11.6 will draw some conclusions and paragraph 11.7 will turn to the use of additional and alternative techniques. Paragraph 11.8. will end with a conclusion.

11.2. The law on *algemene voorwaarden*

The Dutch law on STC's can be found in articles 6:231 et seq BW. The blanket clause, article 6:233 sub a BW, has led to the development of a lot of case law, especially from lower courts.

The BW is commonly considered as a successful codification. Articles 6:231 et seq BW are however relatively new and at some points, it has developed differently than the legislator had expected.[1702] In some respects, the regime is a success: it has enabled, and encouraged, collective negotiations on STC's.[1703]

The Dutch regime has however been severely criticised on the following points:[1704]

1) The rules on the availability of clauses

The strict interpretation of the duty in article 6:234 BW[1705] has been criticised as it wrongly presupposes that clauses are read prior to the contract.[1706] Moreover, after the implementation of Directive 2006/123 in articles 6:230a-c BW, possible overlap with article 6:234 BW, which imposes a much stricter duty on parties, remains. Schelhaas[1707] prefers a rule that is in accordance with article 6:230a et seq BW.

2) Articles 6:235 and 247 BW

The distinction in article 6:235 BW was introduced by lack of a better benchmark and has been critcised as arbitrary.[1708] Loos[1709] moreover finds that the distinction is unnecessary, as article 6:233 sub a BW enables the judge to take the capacity of businesses challenging the fairness of clauses into account, and it is moreover not in accordance with the needs of (some) large businesses that are not in a position to negotiate on STC's. Article 6:235 BW is also problematic as it limits the scope of article 6:234 BW that implements Directive 2000/31, which does not recognise a similar limitation. In addition, Schelhaas[1710] notes that the distinctions in article 6:235 and 247 BW have led to different regimes for different conract parties, and should be simplified. Furthermore, the limitation of article 6:247 BW leads

[1702] E.H. Hondius, 'Tien jaar Nieuw Burgerlijk Wetboek: De regeling van de algemene voorwaarden', *WPNR* 6472 (2002).
[1703] See previously par. 5.5.1.2.
[1704] See however C.E. Drion, 'Een pamflet voor het fundamenteel op de schop nemen van onze regelgeving over algemene voorwaarden', *Contracteren* 2007, p. 3.
[1705] HR 6 April 2001, *NJ* 2002, 385.
[1706] See for an overview J.Hijma, *Algemene voorwaarden*, Kluwer: Deventer 2010, p. 58.
[1707] H.N. Schelhaas, *Algemene voorwaarden in handelstransacties*, Deventer: Kluwer 2011, p. 41.
[1708] J. Hijma, *Algemene voorwaarden*, Kluwer: Deventer 2010, p. 81-82.
[1709] M.B.M. Loos, *Algemene voorwaarden*, BJU: The Hague 2001, p. 25-26
[1710] Schelhaas 2011, p. 39.

to a lacuna: in international cases, it is not clear whether there is a duty for parties to make STC's sufficiently available, also for electronic contracts, despite Directive 2000/31.

3) Article 6:232 BW aims to preserve predictability by ensuring that STC's are applicable.

Notably, the question whether clauses have been validly included in the contract is answered under articles 3:33 and 35 and 6:217 BW. Article 6:232 BW merely stipulates that if parties have justifiably relied on the inclusion of STC's, that reliance includes the whole set of clauses rather than some.[1711] The Hoge Raad has however made an exception for unduly surprising clauses,[1712] but it is not sure whether these decisions will be continued under the BW.[1713] Compared to article 305 BGB, under which clauses that are not made sufficiently available have not become part of the contract, this construction seems to create an unnecesary extra step. It is not clear to what extent this provision has in fact contributed to predictability – German practice manages quite well without a similar rule.[1714] However, before abandoning article 6:232 BW, the legislator should carefully consider what rule would replace it, and whether that rule is sufficiently developed in case law or whether it needs to be codified.

Article 6:232 BW has moreover had some unexpected results. Loos[1715] points out that article 6:232 BW entails that large parties are quickly bound to clauses without being able to invoke the avoidability of clauses on the basis of articles 6:233 and 234 BW. Also, Jongeneel[1716] notes that because the main terms of the contract do not fall under article 6:231 sub a BW, the valid inclusion of these terms will have to be assessed under article 3:33 and 35 BW rather than article 6:232 BW, which can hardly have been intended by the legislator. There is also debate on the question whether article 6:232 BW is applicable on clauses referring to other sets of STC's[1717]

4) The blanket clause in article 6:233 sub a BW

Barendrecht[1718] noted that case law on exclusion clauses does not provide sufficient starting points to deduce how the circumstances relevant for assessing the fairness of clauses are to be balanced, which may be a reason for the courts to pay little attention to one another's decisions. blanket clause. After the introduction of article 6: 233 sub a BW, Hondius[1719] however finds that indications on the fairness and unfairness of clauses can sufficiently be deduced from case law and a lack of predictability seems limited. Pavillion[1720] however points out that article 6:233 sub a BW imposes a considerable burden of proof on consumers who consequenly fail to successfully challenge unfair terms, and inconsistency has developed.[1721]

5) Battle of forms

Debate has arisen on battle of forms, as the rule in article 6:225 par. 3 BW leaves room for unpredictability and does not correspond business practices.[1722]

[1711] T.H.M. van Wechem, *De toepasselijkheid van algemene voorwaarden*, Kluwer: Deventer 2007, p. 24-25.
[1712] HR 20 November 1981, *NJ* 1982, 517.
[1713] Asser/Hartkamp-Sieburgh 6-III (2010), nr 473.
[1714] Comp. MunchKomm zum BGB/Basedow, Inroduction, nr 15, as well as the drfat for reform of the law on STC's of the German Bar Association, at See http://anwaltverein.de/downloads/Stellungnahmen-11/DAV-SN-23-2012.pdf, that states that the law with regard to the inclusion of STC's is not in need of amendment
[1715] M.B.M. Loos, *Algemene voorwaarden*, BJU: The Hague 2001, p. 21.
[1716] R.H.C. Jongeneel, *De wet algemene voorwaarden en het AGB-Gesetz*, Kluwer: Deventer 1991, nr. 158.
[1717] See on this question T.H.M. van Wechem, *De toepasselijkheid van algemene voorwaarden*, Kluwer: Deventer 2007, p. 37-39, who extensively considers the views of other authors.
[1718] J.M. Barendrecht, *Recht als mdoel van rechtvaardigheid*, Kluwer: Deventer 1992, p. 11.
[1719] E.H. Hondius, 'Tien jaar Nieuw Burgerlijk Wetboek: De regeling van de algemene voorwaarden', *WPNR* 6472 (2002).
[1720] C.M.D.S. Pavillon, 'Beter consumentenrecht: Naar een scherpere consumentvriendelijke onredelijk bezwarend-norm', *NTBR* 2011/63. In this sense much earlier also G.J. Rijken, 'De Wet algemene voorwaarden na één jaar: een trieste tussenbalans', *NJB* 1994, p. 643.
[1721] See also below par. 11.4.1.2.
[1722] H.N. Schelhaas, *Algemene voorwaarden in handelstransacties*, Deventer: Kluwer 2011, p. 15, M.B.M. Loos, Algemene voorwaarden, BJU: The Hague 2001, p. 14. Comp. T.H.M. van Wechem, *De toepasselijkheid van algemene voorwaarden*, Kluwer: Deventer 2007, p. 198 who notes that although it is commonly assumed that a first-short rule has developed, the wording of article 6:225 par. 3 BW, the knock-out rule is preferable and can be included in article 6:215 par 3 and 6:231 sub a BW.

6) Article 6:214 BW has remained a dead letter.[1723]

7) Article 6:239 BW has similarly remained a dead letter – the legislator has instead amended article 6:237 BW through the normal legislative procedure.[1724]

Moreover, at some points, the law leaves room for questions:

1) The definition of STC's in article 6:231 BW

It is not clear whether model contracts or clauses drafted by lawyers and notaries in standard conracts also fall under the definition of article 6:231 sub a BW.[1725]

2) The indirect effect of articles 6:236 and 237 BW on clauses in business contracts.

Case law on this question does not provide an unequivocal answer. However, Hijma[1726] suggests several perspectives that can be relevant for assuming the indirect effect of the Dutch model lists.

►In some cases, criticism can partially be traced to disagreement with the legislator's choice, for example, to exclude big businesses from articles 6:233 and 234 BW, but the majority of criticism can be traced to problems with predictability, consistency, and responsiveness.

It may be concluded that the quality of the regime is subject to criticism. Can these problems be traced to the lack of recognition of interdependence and corresponding lack of interaction between relevant actors, or not?

11.3. The development of the law on STC's through the BW.

Have actors adequately considered interdependence in the development of the law on STC's through the BW, and how that has affected the predictability, consistency, accessibility, and responsiveness of the law on STC's?

Paragraph 11.3.1. will will consider the choice to codify the law on STC's. Paragraph 11.3.2. will discuss the attitude of the drafters towards self-regulation. Paragraph 11.3.3. will turn to the drafting and implementation of Directive 93/13, as well as attempts to reform the Directive and national law implementing the Directive. Paragraph 11.3.4. will discuss the law on STC's and international trade and paragraph 11.3.5. will end with a conclusion.

11.3.1. The choice for codification

When the choice for a recodification in the form of the BW was made, interdependence had not yet developed. However, academics drafting the BW extensively considered comparative law, which has benefitted the quality of the code. Later initiatives for harmonisation prompted the legislator to consider the development of separate laws, but this would have undermined the consistency and predictability of the law on STC's.

[1723] See further on this provision below, par. 11.3.2.
[1724] See further on these amendments below, par. 11.3.3.5.
[1725] J.H.M. van Erp, 'De NVM-koopakte: géén algemene voorwaarden', *WPNR* 6037 (1992) rejects this option, while R.H.C. Jongeneel, 'Reactie', *WPNR* 6217 (1996) defends it.
[1726] J. Hijma, *Algemene voorwaarden*, Kluwer: Deventer 2010, p. 46-48.

In 1961, when the first draft for the BW was published,[1727] interdependence, as such, was not an issue in debate. To the contrary, the idea of a new civil code implicitly – necessarily – assumes that the legislator is capable of safeguarding the consistent and accessible development of private law. As private law had developed alongside the old Civil Code, especially in case law, Prof. Meijers[1728] pleaded for a renewed codification of private law, and was accordingly assigned with the drafting of the new civil code. In his efforts, Prof. Meijers was inspired by comparative law, except in matters that were considered innovative from a social or legal point of view.[1729]

Interestingly, the 1961 draft initially did not consider STC's such a subject.[1730] However, during the seventies, the interest in this subject increased, and in 1979, two preliminary reports on standard contract terms were published, pleading for more extensive rules on STC's. Previously, one of the authors had published his PhD thesis on STC's, which included extensive comparative law research.[1731] After the draft containing the first two articles was passed in 1980,[1732] the second part of the draft was submitted, which was based on the advice of the Committee on Consumer Affairs ('*Commissie Consumentenaangelegenheden*', 'CCA').[1733] The 1980 draft took into account German, Austrian, French, and English developments, as well as the 1976 resolution from the Council of Europe, noting that 'although comparative law provides interesting material, it only seldom provides the legislator with a ready-made answer'.[1734] The draft was critically received and drastically amended. The draft was passed in 1987[1735] and became law upon the introduction of the BW on 1 January 1992.

Thus, even though STC's later became an innovative matter, comparative law did provide a source of inspiration, and the influence of especially German law is apparent when looking, for example, at the discussion in Parliament. This interest can hardly be traced to the thought of interdependence – rather, the interest of Prof. Meijers in comparative law emphasised that comparative law may invite one to regard well-settled concepts in a somewhat different light.[1736]

Although problems arising from the use of STC's had been signalled prior to the design of the BW,[1737] the explanatory memorandum to the draft clearly does not aim to codify case law, as judges exercised considerable restraint towards the judicial evaluation of STC's.[1738] Although the Minister pointed out that the judiciary already anticipated the BW,

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[1727] The first draft for book 6 of the BW contained two articles with regard to STC's: article 6.5.1.2, which later became article 6:214 BW, and article 6.5.1.3 that stipulated that parties who had accepted the application of STC's was bound to those STC's, but, according to par. 2, a clause would be avoidable if the user, at the conclusion of the contract, knew or should have known that if the party subjecting to his STC's would have been aware of their content, he would not have entered into the contract. See E.M. Meijers, *Ontwerp voor een Nieuw Burgerlijk Wetboek,Boek 6*, completed by J. Drion, G. de Grooth, and F.J. de Jong, Staatsdrukkerij: The Hague 1961.

[1728] E.M. Meijers, 'Het feillooze deel van ons Burgerlijk Wetboek', in: *Verzamelde privaatrechtelijke opstellen, Eerste deel*, University Press Leiden: Leiden 1954, p. 98.

[1729] V.J.A. Süto*, Nieuw Vermogensrecht en rechtsvergelijking – reconstructie van een wetgevingsproces (1947-1961)*, BJU: The Hague 2004, p. 28.

[1730] Parl. GS, Book 6, . 852.

[1731] E.H. Hondius, *Standaardvoorwaarden*, Kluwer: Deventer 1978.

[1732] Stbl 1980, 432.

[1733] Comp. CCA, *Advies inzake het vraagstuk van de toepassing van standaardvoorwaarden bij transacties met de consument*, SER: The Hague 1978, which in annex 4 provides an overview of the development of the law in this area in other states.

[1734] Parl. Geschiedenis (Inv. 3, 5 and 6), p. 1455. At p. 1467 and 1505 it is however remarked that the AGBG has served as a direct example.

[1735] Stbl 1987, 327.

[1736] Süto 2004, p. 29.

[1737] See for an overview of the most important publications R.H.C. Jongeneel, *De Wet algemene voorwaarden en het AGB-Gesetz*, Kluwer: Deventer 1991, p. 11, note 14.

[1738] Parl. GS (Inv 3, 5, and 6), p. 1649, p. 1518. E.H. Hondius, 'Het Nieuw Burgerlijk Wetboek en de gewone burger: de algemene voorwaarden', *Rechtshulp* 1991, p. 4, points out that the standard in article 6:233 sub a BW had been previously developed by the Hoge Raad.

and that businesses would likely similarly anticipate the BW by adapting their STC's,[1739] the legislator rejected the idea of leaving the development of the law on STC's to case law. Decisions from the Hoge Raad indicated that the judiciary would not develop case law, which would leave a gap in the law.[1740] Moreover, as the draft introduced the judicial evaluation of STC's, this created a potential for unpredictability, which required that the draft carefully considered – and remedied – this potential shortcoming. Therefore, problems would arise if STC's were not dealt with through legislation.

By the time the draft was passed, initiatives for harmonisation had developed. In its advice to the government on the law on STC's, the Committee on Consumer Affairs[1741] already took notice of these initiatives, but did not consider these initiatives as an obstacle to codification.

However, these initiatives did prompt Parliament to briefly consider separate legislation implementing the *acquis*. During the discussion in Parliament, the introduction of the law on doorstep selling, an implementation of Directive 85/577 on doorstep selling, was discussed, and the introduction of a separate law was considered, because the BW might not be implemented before 1990.[1742] The introduction of separate laws was however rejected as this might delay the introduction of the BW even further.[1743] Other objections included the possible tension between old Dutch law and the BW, which also made a separate introduction of a new law on STC's more difficult.[1744]

Thus, the defense of codification by Prof. Meijers may sit somewhat uneasily with the increasing interdependence of actors developing private law. Notably, the defense for codification is based on the aims of codification, without considering the possibility of interdependence. However, the important role of comparative law in the drafting of the BW ensured that the law of STC's was the result of critical consideration of foreign law, in line with European law that not only invites, but demands such a critical view. Yet because of the timing and the drafting of the Dutch law on STC's and Directive 93/13, such a critical view of the new Dutch law or the codification of the law on STC's was problematic.

11.3.2. Replacing self-regulation through the BW

In the drafting of article 6:214 BW, the legislator did not sufficiently take into account that later initiatives increased the role of private parties, reflecting a different view on the role of privat parties. Thus, this provision was not responsive to national practice or to national legal views on the role of private parties, and has accordingly been reduced to a dead letter. The wording of this provision gives a different impression, thus undermining the accessibility of the law for parties not familiar with Dutch practice.

At first sight, the impression arises that the legislator expressly provided a role for private parties through article 6:214 BW. This provision provides that standard rules ('*standaardregeling*') can be drafted for a particular branche or profession, to de designated by royal decision ('*Koninklijk Besluit*'). Standard rules are designed by a committee to be appointed to the Ministry of Justice, the composition of which is to be determined by law.[1745] The standard rules enter into effect upon the approval of the Ministry, as officially published.

[1739] Parl GS (Inv 3, 5, and 6), p. 1506.
[1740] Parl GS (Inv 3, 5, and 6), p. 1497. See in favour CCA 1978, p. 41 referring to legislation in surrounding states as well as the EU to support the need for consumer protection.
[1741] CCA 1978, p. 3.
[1742] Parl GS (Inv 3, 5, and 6), p. 1472-1473.
[1743] Parl GS (Inv 3, 5, and 6), p. 1490.
[1744] Parl GS (Inv 3, 5, and 6), p. 1506.
[1745] Notably, the law on standard rules committees ('*Wet commissies standaardregelingen*').

Standard rules can diverge from default law, and parties may, in turn, diverge from standard rules, which may however be made subject to requirements of form. Standard rules would be applicable to contracts entered into in a professional or business capacity.

Article 6:214 BW was drafted because it was recognised that STC's were often drafted one-sidedly, without taking into account the public interest. The involvement of the state in the drafting of STC's, and preferably the inclusion of all relevant parties would remedy these defects and would moreover be in line with a tendency to involve the state in the recognition of collective contracts.[1746]

Did this regime enable private parties, by creating a possibility for co-regulation, or did it, in contrast, limit the role of contract parties? The regime did not take away contract parties' ability to draft STC's, nor did it force them to enter into negotiations on standard rules or even to comply with them, while it also involved stakeholder parties into negotiations. However, if aticle 6:214 BW had been successful, this would have limited the role of contract parties in independently drafting STC's. This limitation was considered desirable because of contract parties' limited perspective and the disadvantages associated with the use of STC's.

This point of view, reminiscent of the German view on the role of private parties, has been traced to the critical attitude of Prof. Meijers and others to self-regulation.[1747] The requirements set for the drafting of standard rules, in accordance with a critical view of private parties' role, have not facilitated a successful use of this possibility, even though the increased use of this regime has been debated in Parliament[1748] and in literature.[1749]

Interestingly, although the 1981 draft does take into account German experiences, it takes a less suspicious view of private actors. The 1981 draft explicitly aimed to increase negotiations between stakeholder groups.[1750] The CCA[1751] expected that designing private law specifically for STC's would induce businesses to enter into negotiations with organisations representing consumers, for which it had developed a pilot project on which it extensively reported. Collective negotiations on consumer contracts have subsequently developed in the framework of the CCA. The success of these collective negotiations for consumer contracts has severely limited the success of the standard rules. Also, the judicial control developed by the 1981 draft may have contributed to the quality of STC's, which may further undermine parties' motivation to draft standard rules.

Does the lack of success of article 6:214 BW mean that other initiatives that also overlook the prominent role of private parties in this area will be similarly unsuccessful? As the role of private parties in the multilevel legal order becomes more prominent, this possibility should be taken into account by actors developing legislation.

The existence of other sources of law may additinally complicate the development of standard rules. Although they are likely not an obstacle to cross-border trade, because of their default character and their aim to faciliate trade, they may conflict with international model contracts, for example from the ICC.[1752] Prof. Meijers[1753] emphasised that standard rules would be devised for areas in which the quality of STC's showed severe shortcomings. In contrast, if STC's were the process of collective negotiation, standard rules would merely

[1746] Parl. GS, Book 6, p. 839.
[1747] Asser/Vranken (2005) nr 78.
[1748] *Kamerstukken II*, 2006-2007, 29279, nr 41, p. 18,
[1749] E.H. Hondius, 'Standaardregelingen in de bouw', in: E.H. Hondius, A.G.J. van Wassenaer, *Van standaardvoordwaarden naar standaardregeling?, Preadviezen voor de Vereniging van Bouwrecht*, Kluwer: Deventer 1993, p. 10-11. The procedure had already been criticised by CCA -1978, p. 13.
[1750] Parl GS, (inv 3,5 and 6) p. 1455.
[1751] CCA 1978, p. 8-9, the report on the pilot project can be found in annex 3.
[1752] Parl. GS, Book 6, p. 850.
[1753] Parl. GS, Book 6, p. 851.

sanction existing rules. Prof. Meijers found that if international model contracts functioned effectively, additional rules should not be developed,

Also, relevant Directives will stand in the way of the possibility to mitigate the consequences of mandatory consumer protection law through drafting standard rules.[1754] In areas falling outside the scope of these Directives, especially Directive 93/13, this is not problematic.[1755] Also, standard rules are not incorporated into the contract, but they are additional law applicable to the contract.[1756] Does this mean that they fall under the exception of article 1 par. 2 Directive 93/13? If this is the case, the development of standard rules could theoretically circumvent the minimum level of protection established in the Directive. In the unlikely scenario that standard rules are developed, European actors should be consulted beforehand, to see whether standard rules for consumer contracts fall within the scope of Directive 93/13. It is detrimental for the predictability of law to develop a practice that may later be challenged before the courts and eventually the CJEU.

Thus, the role of private parties in collectively negotiating STC's had undermined the success of article 6:214 BW, which undermines the accessibility and the responsive development of the law on STC's. Therefore, article 6:214 BW should be reconsidered, both because its lack of importance in legal practice as well as possible difficulties with Directive 93/13.

11.3.3. The development of Dutch law and harmonisation

Have Dutch actors, in the drafting and implementation of Directive 93/13 and other relevant Directives, adequately taken into account that the development of harmonisation necessitated interaction with European actors, and if so, how has that affected the predictability, accessibility, consistency and responsiveness of the law on STC's?

Paragraph 11.3.3.1. will consider the development of Directive 93/13 and paragraph 11.3.3.2. will discuss the implementation of the Directive. Paragraph 11.3.3.3. will consider the application of the Directive by the courts. Paragraph 11.3.3.4. will consider the attempted revision of Directive 93/13 and paragraph 11.3.3.5. will discuss legislative reform at the national level. Paragraph 11.3.3.6. will end with a conclusion.

11.3.3.1. The drafting of Directive 93/13

The reports of the Dutch legislator reflected an active participation in the European debate that also served to prevent that the Directive would require considerable adaptations of new articles 6:231 et seq BW.

Before the Directive was established, the Dutch legislator consulted the CCA[1757] that had also advised on the drafting on articles 6:231 et seq BW.

The CCA was divided on the need for a Directive, but it approved the limitation of the Directive to consumer contracts. The CCA did draw attention to the definition of 'consumer' that should be interpreted narrowly, in accordance with CJEU case law, as well as the exemption of the main terms of the contract from the scope of the Directive. Moreover, the CCA proposed limiting the scope of the Directive to written clauses, and argued for the inclusion of an information duty for businesses in the Directive. With regard to future article 3, the CCA held that technically, the inclusion of a blanket

[1754] Asser/Hartkamp/Sieburg (2010), 6-III, nr 513.
[1755] For example in contracts for the sale of houses, artice 7:2 par. 4 BW, which fall outside the scope of Directive 99/44.
[1756] Asser/Hartkamp/Sieburg (2010), 6-III, nr 513, who also note that diverging from standard rules will make it more likely that 1.3.1.3.1. they are unfair under article 6:233 BW.
[1757] CCA, *Oneerlijke bedingen in consumentenovereenkomsten*, advice 91/11, 30 May 1991, p. 12, 16.

clause or ambiguous provisions were necessary, and a blanket clause should enable judges to take into account the way in which a clause had been drafted. The CCA also indicated that more clarity on the status of the model list in the Annex to the Directive would be desirable. The CCA found that the model list could reflect clauses that were ineffective in all Member States, although this would be a short list. The CCA emphasised that clauses needed to be drafted in a manner that would avoid unpredictability and opposed a European gray list for the same reason. The question whether this would be a limitative list depended on the question whether the Directive would pursue minimum or maximum harmonisation.

Further debate on the points raised by the CCA hardly developed, although, with the benefit of hindsight, this would have been beneficial.

The criticism of Bakker and Jongeneel[1758] is an exception. Bakker and Jongeneel, who also refer to the advice from the European Consumer Law Group and the advice of the Economic and Social Committee, as well as German criticism, similarly refer to the definition of consumer and also find that the Directive should be limited to consumer contracts, and likewise note that the Directive should not cover the main terms of the contract. They also join the request that the status of the model list in the Annex to the Directive be clarified, and add that the collection of clauses in the 1990 draft seems arbitrary, and apparently does not contribute to the interpretation of the proposed blanket clause. Bakker and Jongeneel however draw into doubt the added value of an information duty, although they support the inclusion of a rule similar to the *Transparanzgebot*, and consider the inclusion of future article 3, the wording of which they criticise.

The CCA advice provided a good starting point for the position of the Dutch legislator,[1759] who briefly discussed the discussion on the proposal for a Directive on unfair contract terms and the advice of the CCA on the draft in Parliament, from which it diverged in several points.

While the Dutch government agreed with the importance of self-regulation, and restraint with harmonisation initiatives, it supported the proposal for a Directive on unfair terms, and did not discuss the need for the Directive.

The Dutch government[1760] reported to Parliament that the debate in the European Council focussed on the scope of the Directive, the question whether the main terms of the contract should be subjected to judicial evaluation, and stated that a Dutch compromise would form the basis for further discussions in the council. The Dutch government[1761] subsequently reported that the amendments to the proposal were in accordance with Dutch objections, and Dutch law accordingly did not have to be amended. Interestingly, the rather brief and general statement of the government on the CCA advice, without further debate, did not make Parliament aware of differences between the CCA advice and this seems not to have been debated in Parliament that earlier, and more generally, criticised the incomplete and late information it received on proposals for Directives.[1762]

Interestingly, in the German legal order, the amendments to the 1990 drafts are attributed to German criticism. As Dutch law took German law as an important starting point, German and Dutch criticism may well have coincided.

[1758] H.J. Bakker, R.H.C. Jongeneel, 'Een rechtlijnige richtlijn', *TvC* 1992, p. 7-17.
[1759] *Kamerstukken II*, 1992-1993, 23162, nr 1, p. 5.
[1760] *Kamerstukken II*, 1991-1992, 21501-15, nr 4, p. 2.
[1761] *Kamerstukken II*, 1991-1992, 21501-15, nr 6, p. 1-2.
[1762] *Kamerstukken II*, 1991-1992, 21209, nr 47, p. 10-11.

Thus, the active participation of the Dutch legislator may have prevented that Directive 93/13 would necessitate drastic amendments to newly drafted law that had yet to become effective.

11.3.3.2. The implementation of Directives affecting the law on STC's

The interaction between Dutch, European and foreign actors in the implementation of Directive 93/13 and other relevant Directives has been limited, and problems of predictability, consistency and accessibility have accordingly arisen.

Because the Dutch legislator considered that Dutch law was already in accordance with the Directive, the law on STC's was not amended, and a consultation was also not initiated.[1763]

Accordingly, some differences between the Directive and Dutch law remained. Thus, articles 6:231 et seq BW initially did not include a rule on *contra preferentem* interpretation, while it was also limited to written clauses. Initially, it seemed as if the *Hoge Raad* limited this rule,[1764] and it was argued that the codification of this rule was necessary.[1765]

Furthermore, article 6:231 BW did initially not provide that the main terms of the contract would be subject to judicial evaluation if they are not clearly formulated. Moreover, article 6: 231 BW defines STC's as clauses that have been drafted to be used in multiple contracts. Interestingly, the German legislator amended article 310 par. 3 sub 1 BGB as it was considered that maintaining a similar requirement for consumer contracts was contrary to the Directive.[1766] Notably, however, the Commission did not single out this definition, which raises the question whether the German legislator unnecessarily amended its law. Clarifying this question should however be reserved to the CJEU.

Additionally, it has been debated whether the avoidability of unfair terms is in accordance with the Directive, especially after CJEU decisions that clauses are to be evaluated *ex officio*. The sanction of avoidability is in accordance with the general rule in article 3:40 par 2 BW that if a provision aims to protect one of the contract parties, this leads to avoidability, unless the provisions entails otherwise. In this view, sanctioning unfair clauses with invalidity is not necessary, also because article 3:40 par. 2 BW does not exclude the possibility that the judge sets aside clauses contrary to provisions aiming to protect the consumer. Article 3:40 par. 2 BW expressly allows for divergences from this general rule by stipulating that provisions are avoidable unless the provisions entails otherwise. Consequently, provisions that implement Directives more generally justify invalidity rather than avoidability in this sense.[1767] However, this argument suggests that avoidability in article 3:40 par. 2 BW would have different implications depending on the context.[1768] Also, maintaining the avoidability rather than the invalidity of unfair clauses is problematic as avoidability cannot be considered by the judge *ex officio*.

This position was not based on discussion but rather on the previous advice of the CCA and the drafting process, and the position did not change after criticism that the Dutch regime was not in accordance with the Directive. Especially Hondius[1769] pointed to differences

[1763] *Kamerstukken II*, 1991-1992, 21501-15, nr 6, p. 1-2, similarly, R.H.C. Jongeneel, 'Een richtlijn die weinig schade aanricht', *TvC* 1993, p. 118.
[1764] HR 28 April 1989, *NJ* 1990, 583, which however included a contract between businesses. In HR 24 September 1993, *NJ* 1993, 760, in an international consumer contract, it was however held that interpretation contra preferentem was merely one point of view between other views.
[1765] E.H. Hondius, 'Non-implementation of the Directive on unfair contract terms: The Dutch case', *ERPL* 1997, p. 195, similarly A.-G. Tizzano in his conclusion before C-199/44 (Commission/Netherlands), par. 23.
[1766] See previously par. 10.3.2.2.
[1767] N. Frenk, 'Ambtshalve toetsing van dwingend Europees consumentenrecht: gevolgen van het arrest van het Europese Hof van Justitie van 27 juni 2000 voor het Burgerlijk Wetboek', *WPNR* 6431 (2001), p. 74-75.
[1768] C. Cauffman, M. Faure, T. Hartlief, *Harmonisatie van het contractenrecht in Europa: consequenties voor Nederland*, Advice 26 March 2009, WODC, p. 269.
[1769] E.H. Hondius, 'Non-implementation of the Directive on Unfair Contract Terms: the Dutch case', *ERPL* 1997, p. 193.

between the Directive and Dutch law, and held that Dutch law should be amended. Hijma[1770] also found that while the differences between Dutch law and the Directive were superficial and would probably be covered by an active approach of the judiciary towards the implementation of the Directive, the restraint adopted by the Dutch legislator should be reconsidered, even if the amendments to Dutch law would only be introduced for politeness' sake.

However, the later decision of the CJEU has learned that the Dutch legislator should be more careful in its approach. Although Commission/Netherlands [1771] clarified the obligations of national legislators in the implementation of Directives, the decision makes clear that the possibilities for the Dutch legislator to maintain a stable development of the law are limited once Directives have been established.

Would more debate however have led to a different approach of the legislator? Possibly, a more elaborate discussion in Parliament, or observations from forein parties, could have prompted the Dutch government to reconsider its approach. However, more attention for CJEU case law would not have prompted a different approach. Likethe German legislator, the Dutch legislator mistakenly relied on CJEU case law reiterating the discretion of the legislator in the implementation of Directives. However, the interaction with the European Commission indicated that the implementation of Directive 93/13 was insufficient.[1772]

The Commission accepted that the case law of the *Hoge Raad* already exempedt the main terms of the contract from judicial control, but nevertheless advised that these provisions of the Directive where implemented in the BW rather than case law.[1773] In accordance with this advice, The Netherlands, although it had started the procedure to amend the law accordingly, did not make amends within two months, as requested by the Commission, which consequently started a procedure to demand correct implementation. The CJEU[1774] accordingly held that articles 4 par. 2 and 5 Directive should be implemented in the BW, as relying on case law was insufficient implementation.

After the CJEU decision in Commission/The Netherlands, article 6:238 par. 2 BW was inserted, codifying contra-preferentem interpretation and article 6:231 was amended so as to exempt the main terms of the contract, provided that they were sufficiently clear, from judicial control. That does however not mean that the Dutch legislator could not have chosen to go beyond the level of protection in the Directive, provided that it had done so through legislation, as became apparent after the decision of the CJEU in Caja de Ahorros.[1775]

The subsequent amentments of articles 6:231 et seq BW further demonstrate the decreased ability of the national legislator to maintain the predictable development of the law on STC's, in particular by exercising restraint in amending the law.

In 2004, article 6:234 BW was amended to implement article 10 par. 3 Directive 2000/31 on e-commerce, which stipulates information requirements that businesses can diverge from. Article 10 par. 1 Directive 2000/31 makes clear parties can diverge from the rule on making available STC' in electronic contracts, which has however not been sufficiently implemented.

[1770] J. Hijma, Richtlijn 93/13/EEG betreffende oneerlijke bedingen in consumentenovereenkomsten', in: S.C.J.J. Kortmann et al. (eds.), *Onderneming en 5 jaar Nieuw Burgerlijk Recht*, Tjeenk Willink: Deventer 1997, p. 425.
[1771] CJEU 10 May 2001, (Commission v The Netherlands), C-144/99, [2001] ECR, p. I-3541.
[1772] *Kamerstukken II*, 1998-1999, 26470, nr. 5, p. 2.
[1773] *Kamerstukken II*, 1998-1999, 26470, nr. 3, referring to HR 19 September 1997, *NJ* 1998, 6, that does however not refer to contra legem interpretation.
[1774] CJEU 10 May 2001 (Commission/The Netherlands), C-144/99, [2001] ECR, p. I-3541.
[1775] CJEU 3 June 2010 (Caja de Ahorros/Ausbanc), C-484/08, [2010] ECR, p. I-4785.

Notably, however, article 6:235 BW stipulates that article 6:234 BW is not applicable to large business in the sense of article 6:235 par. 1 BW. In 2009, article 6:234 BW was amended for the implementation of Directive 2006/123, stipulating that if STC's fell under article 230c par. 6, the user can make the STC's available in the ways prescribed under article 6: 230c BW. Article 6:230c BW stipulates that the information is made available on the initiative from the provider of services, is easily accessible for the consumer at the place where the service is provided or the contract is concluded, is easily available at an internet address made available by the provider, or is included in all documents provided by the provider of services that describe the services in detail Unsurprisingly, this amendment led to criticism that the law was unclear on the way in which STC's should be made available. A 2010 amendment[1776] revised article 6:234 BW and left out the referral to 6:230c BW, which enabled sellers to make STC's available on their website. The Dutch government recognised the need to compensate this amendment,[1777] and accordingly amended article 6:234 BW.[1778] In these cases, the simultaneous implementation of various Directives in one part of the code has clearly given rise to inconsistency and inaccessibility, as well as the stable development of the law.

Thus, the interaction in the development of the law on STC's and the interaction in the European debate, as well as the timing of the Directive 93/13 limited the willingness of the Dutch legislator to amend the law. Although the Dutch legislator, like the German legislator, has exercised restraint in the implementation of Directives, this approach was not similarly successful. The restraint of the legislator in interacting with European, foreign, as well as national actors in the implementation of Directives has proven problematic.

11.3.3.3. The application of Directives by the courts

In the application of national law implementing Directives, the restraint of the legislator in interacting with European, foreign and national actors has been echoed by the courts, which has further lessened the predictability, consistency, accessibility and responsiveness of the law on STC's.

- Initially, restraint did not become apparent, as the *Hoge Raad* had anticipated on the draft for articles 6:231 et seq BW.[1779]

- Further decisions of the Hoge Raad however show that national law implementing Directive 93/13 are interpreted in accordance with Dutch law and the preferences of the Dutch legislator.

A 1997 decision of the Hoge Raad, [1780] as well as the conclusion of A.G. Vranken, refers to Parliamentary history on the drafting of articles 6:231 et seq Directive, and although the exception in article 6:231 sub a BW for main contract terms was included on the instigation of the Commission, the Hoge Raad does not refer the question how main contract terms in the sense of article 4 par. 2 Directive are to be interpreted.

[1776] Stb. 2010, 222.
[1777] *Kamerstukken I*, 2010-2011, 31358, G.
[1778] Stb 2011, 500.
[1779] HR 25 April 1986, *NJ* 1986, 714 (with a critical note of W. van der Grinten), repeated in HR 16 January 1987, *NJ* 1987, 553.The question whether clauses are in accordance with good faith, is a question of law, not of fact.
[1780] HR 19 September 1997, *NJ* 1998, 6.

In its 2003 decision, the Hoge Raad[1781] confirmed this decision, without referring to the Directive at all, similar to the conclusion of the A.-G. A less wide interpretation of the main terms of the contract in the meaning of article 4 par. 2 Directive seems in accordance with the aim of consumer protection of the Directive and need not necessarily be problematic, as the CJEU decision in *Caja de Ahorros* may choose to extend judicial evaluation.

It is however not a harmonised interpretation of the term used in the Directive, and the Dutch interpretation accordingly differs from the German interpretation.[1782]

- In addition, in some cases, the Hoge Raad has maintained its own case law rather than interpreting a case in accordance with Directive 93/13.

Accordingly, the Hoge Raad[1783] referred to its own case law, maintaining that contra preferentem interpretation was merely a relevant point of view among other points, and did not anticipate the inclusion of article 6:238 par. 2 BW.

The extension of the scope of the regime on STC's also does not entail that cases involving B2B contracts are decided in accordance with the Directive. Before the Directive went into effect, the Hoge Raad did not anticipate on the Directive in the way it had done with articles 6:231 et seq BW,[1784] and after the Directive went into effect, decisions have not referred to the Directive either.[1785]

Lower instances,[1786] in the interpretation of articles 6:231 et seq BW in consumer cases, have similarly not referred to either Directive 93/13 or foreign decisions that could be relevant for the consistent interpretation of the Directive throughout the Union. Some decisions are clearly in contrast with Directive 93/13.[1787] However, other lower courts[1788] have expressly referred to the Directive and CJEU case law.

Moreover, the interpretation methods of the Hoge Raad, as well as some lower courts, may not be in line with European law. Particularly, the emphasis on legislative history may be difficult to reconcile with the decision from the CJEU in *Björnekulla Fruktindustrier*,[1789] where the CJEU ruled that national courts need to interpret national law in the light of the wording of Directives, despite contrary interpretation that may follow from the *travaux préparatoires*. That does not mean that courts may not rely on parliamentary history. In Commission/Sweden, the CJEU[1790] accepted that parliamentary history is an important source for interpreting (implemented) law in some Member States, and upheld the inclusion of the list in the Annex to the Directive in parliamentary history. Accordingly, Dutch courts frequently assume that the legislator aims to implement a Directive and therefore, national law is in accordance with, or should be interpreted in accordance with, a Directive.[1791] However, *Björnekulla Fruktindustrier* indicates that if legislative history is contrary to the wording of the Directive, legislative history does not justify interpretation contrary to the wording of the Directive. Relying primarily on parliamentary history in the interpretation of

[1781] HR 21 February 2003, *NJ* 2004, 567.
[1782] Comp. BGH 14 October 1996, *NJW* 1998, 383.
[1783] Comp. also HR 14 October 2002, *NJ* 2003, 258
[1784] HR 9 September 1994, *NJ* 1995, 285.
[1785] For example HR 12 July 2002, *NJ* 2002, 542, Hof Amsterdam 26 June 1996, *NJ* 1997, 264,
[1786] Ktr. Heerlen, 8 April 2009, *Prg*. 2009, 73, Ktr. Venlo, 1 July 2009, WR 2010, 17, referring to article 7:219 BW for a clause holding that a contract for accommodation would be terminated if the tenant breached articles 2 or 3 on the forbidden substances act ('*Opiumwet*'), Rb. Utrecht 23 July 2008, *Prg*. 2009, 9, Hof 's-Hertogenbosch 29 May 2009, *NJF* 2009, 336.
[1787] Especially Ktr. Haarlem 22 January 2003, *Prg*. 2003, 6031, refusing to evaluate STC's in a consumer contract of its own motion as the consumer had invoked the unreasonableness of the STC's, and similarly Rb. Utrecht 4 January 2006, *NJF* 2006, 152. Comp. also Hof 's-Gravenhage 10 September 2004, *Prg*. 2005, 13, upholding a clause in a consumer contract excluding liability falling under article 6:237 BW.
[1788] See for example Rb. Arnhem 14 April 2010, *NJF* 2010, 209, Ktr. Amsterdam 15 January 2010, 2010, 50, Ktr. Haarlem 13 May 2009, *Prg*. 2009, 105, Ktr. Rotterdam 17 July 2008, *Prg*. 2008, 163.
[1789] CJEU 29 April 2004 (Björnekulla Fruktindustrier v Procordia Food), C-371/02, [2004] ECR, p. I-5791, par. 13.
[1790] CJEU 7 May 2002 (Commission/Sweden), C-478/99, [2002] ECR, p. I-4147.
[1791] M.H. Wissink, *Richtlijnconforme interpretatie*, Kluwer: Deventer 2001, p. 154.

articles 6:231 et seq BW may be problematic because the legislative history that the courts refer to regards the introduction of the BW and not the implementation of Directives. Therefore, assuming that the Dtch legislator meant to implement the Directive, and referring to parliamentary history, may not be correct.

- The courts have similarly adopted restraint in the interpretation of national law implementing Directives 2006/123 or Directive 2000/31, which decreases the chance that the courts will remedy the careless implementation of these Directives by the Dutch legislator.

A 2007 decision from the Hoge Raad,[1792] has also been interpreted in line with national law. The Hoge Raad however distinguishes between the question whether parties have included the STC's in their contract, a question that should be decided under article 3:33 et seq BW, and the question whether STC's have been made available in practice in accordance with article 6:233 and 234 BW, upholding the decision of the court of appeal that the terms had been made available under article 6:234 par. 1 BW.

A 2011 decision[1793] similarly shows restraint. The Hoge Raad decided on the question whether STC's had been made reasonable available that could be found online with a search engine. As the party subjected to the STC's had not expressly agreed with taking note of the STC's electronically, the Hoge Raad held that the STC's had not been made reasonably available, and that interpretation responsive to legal practice did not entail that, if STC's may be made available online, the user of STC's merely has to ensure that STC's may be found online after an online search.

The Hoge Raad does not refer to either of the Directives, but A.-G. Wissink refers to Directive 2006/123 on services, but not to Directive 2000/31 on e-commerce, and he does not consider that parties that are not consumers, as in this case, may diverge from article 10 par. 3 Directive 2000/31. It is unclear whether parties may also agree on this silently. This possibility, which is not included in article 6:234 BW, is left open, as this had not been argued before the court. Also, questions with regard to the simultaneous applicability of the Directives and questions of priority arise from this case. A CJEU decision clarifying the potential overlap between these Directives would however been welcome.

The approach of lower courts differs. Decisions from lower instances[1794] do not refer to either the Directive or foreign decisions. Some lower courts explicitly follow the course adopted by the Hoge Raad.[1795] Other lower courts[1796] have diverged from the course adopted by the Hoge Raad and the decisions from other lower courts, [1797] as well as the explanation of the Minister of Justice in the amendment of article 6:234 BW that merely referring to STC's on a website did not suffice for making STC's available.[1798]

The decision of the court of appeal Arnhem[1799] is one of the few decisions that has taken into account Directive 2006/123. The court upheld STC's that were made available to the counterparty at the office of the user of STC's, expressly referring to article 6:230c and Directive 2006/123, apparently diverging form the Hoge Raad.

[1792] HR 21 September 2007, *NJ* 2009, 50. The conclusion of A.G. Spier under pars. 3.23 and 3.38 however does refer to CJEU case law on jurisdiction clauses under article 17 Lugano Convention, Directive 93/13 and soft law.
[1793] HR 11 February 2011, *NJ* 2011, 571, comp pars. 2.2 et seq in the conclusion of A.-G. Wissink.
[1794] See for example Ktr. Roermond 11 August 2008, *NJF* 2009, 378, Rb. Utrecht 23 July 2008, *NJF* 2008, 436. Ktr. Alkmaar 2 May 2007, Prg. 2008, 9 refers to case law form the Hoge Raad.
[1795] Rb. Zwolle 14 January 2009, *LJN* BI3429.
[1796] See for example Hof 's-Hertogenbosch 13 October 2009, *LJN* BL1921, deciding that a clause that the user of STC's had referred to in an email, referring to the address of a website on which the STC's could be downloaded, had been validly included in the contract, Ktr. Haarlem, 29 August 2007, *NJF* 2008, 42, finding that referral to the website, on the offer that was in writing, sufficed for inclusion under article 6:234 BW. Both decisions did not refer to Directive 2000/31.
[1797] Rb. Maastricht 20 January 2010, *NJF* 2010, 253. Rb. Zutphen 19 August 2009, *NJF* 2009, 463 refers to legislative history.
[1798] *Kamerstukken II*, 2007-2008, 31358, nr. 3, p. 9-10.
[1799] Hof Arnhem 11 december 2012, *LJN* BY5306.

►The restraint adopted by the courts diminishes the chance that shortcomings in the implementation of relevant Directives are compensated. This is detrimental to private parties as the lack of predictability, accessibility and inconsistency resulting from articles 6:234 and 6:230c BW are not remedied. Also, the lack of interaction between courts has led to inconsistency and unpredictability for private parties has entailed that law that is mroe lenient to business parties has been overlooked, with may diminish the responsiveness of private law to legal practice. Because of the restraint of courts in referring questions to the CJEU, unpredictability, inconsistencies and a lack of responsiveness remain.

The restraint of courts in referring to the CJEU also is detrimental for the development of the *acquis* in the long term, as it decreases the chance that inconsistencies and problems in the implementation of Directives are brought to the attention of European actors, which increases the chance that problems in the *acquis* will not be remedied.

11.3.3.4. The attempted reform of Directive 93/13

Dutch actors have shown restraint in interacting with European actors and national non-state actors, which entails that the attempted reform did not deal with problems currently visible in the law on STC's. Consequently, the responsive development of the Directive is undermined.

Although the Dutch legislator did not initiate a separate consultation on the proposed reform of the 1993 Directive, it did refer to the CCA for advice on the draft,[1800] and included stakeholders preceding the advice. The WODC also provided a report.

The evaluation of the Directives was not finished when the draft Directive was published, and the reports are therefore not based on the experiences with the Directive.

The advice of the CCA,[1801] after criticising the positions of the European Commission and the impact analysis, extensively considers the potential consequences of maximum harmonisation. It does not reject maximum harmonisation outright and finds that maximum harmonisation may still leave some room for Member States in matters falling outside the scope of the Directive. However,t he CCA doubts claims that maximum harmonisaiton will increase cross-border trade and warns for a lower level of consumer protection.

The CCA[1802] also criticised the wording of the proposed EU model list that left room for discussion whether clauses fell under the list. Interestingly, the CCA noted that the question whether a model list should be precisely worded or not depends on the question what aim these model lists pursue. The national model list was strictly enforced in Germany, but the clauses in the Dutch legal order left more discretion to the courts. The CCA – incorrectly – held that clauses falling under the black list also allowed for some discretion, and convincingly stated that the list should be specified for points where discussion in legal practice was likely to arise.

The CCA held that it would benefit consumers if the list more closely related to special regimes that were of interest to the consumer, such as the regime on consumer sales in book 7 BW. The CCA furthermore provides an overview of clauses in articles 6:236 and 237 BW that are used often against consumers, and wondered at the absence of these clauses in the proposal. In addition, the CCA pointed to clauses contrary to mandatory law, clauses diverging from default law, and unduly surprising clauses, noting that these should be included in the draft Directive and Annex.

Although the CCA[1803] recognised the use of comitology as a useful technique, it rejected the possibility to amend the EU model lists in this manner, because it concerns an issue too important for

[1800] See the letter of the Minister, 10 December 2008, at http://www.ser.nl/~/media/DB_Adviezen/2000_2009/2009/b27871.ashx.
[1801] CCA, Consumentenrechten in de interne markt, advice 09/05, 17 June 2009, available at http://www.ser.nl/~/media/DB_Adviezen/2000_2009/2009/b27871.ashx, p. 15, 21- 26.
[1802] CCA 2009, p. 68-74.
[1803] CCA 2009, p. 74.

legal practice. Therefore, the CCA preferred a democratic procedure that takes into account the views of stakeholders.

The WODC report[1804] that was published prior to the advice of the CCA, also contributes to the discussion and provided information for the Dutch legislator in the European debate. Differently than the CCA, the report[1805] suggests replacing articles 6:236 and 237 BW by the EU model list, considering that the comparison of the Dutch and the European list would be 'too complicated' – and it may be doubted whether articles 6:236 and 237 BW could be maintained under a Directive pursuing maximum harmonisation. The report goes on to critically evaluate to what extent articles 6:236 and 237 BW could be maintained, and which clauses would have to be removed, moved to the grey list – clauses on the grey list are, interestingly, not moved to the black list – and which clauses would be introduced. The report[1806] further recommends that the sanction of avoidability, which seems in accordance with article 3:40 par. 2 BW, should be amended, so that it stipulates that clauses will not be binding on the consumer.

In addition, in the WODC report,[1807] the amendments of Dutch law in accordance with the proposed Directive also prompt a reconsideration of the information duties under article 6:233 sub b and 6:234. Amending article 6:231 sub a BW, so that it would include the notion of STC's as not-individually negotiated contracts, would also ensure the correct implementation of the Directive. Also, the debate on the question whether the avoidability of unfair clauses sufficiently implements the Directive could have prompted the Dutch legislator to reconsider article 3:40 BW, which has more generally been described as a failure.[1808]

The WODC report[1809] notes that the proposal will lead to a lower level of consumer protection, and recognises the dilemma of legislators in either exercising restraint in the implementation of Directives or a more active approach. On the one hand, exercising restraint is beneficial for the consistency and predictability of law, but it may undermine the correct implementation of Directives. On the other hand a more active approach contributes to the correct implementation of the Directive, but it may weaken the consistency and predictability of the law.

However, the Dutch experience in the implementation of Directives shows that despite restraint, problems of predictability, accessibility and consistency may still arise.

In Parliament, the Dutch government[1810] stressed that maintaining a high level of consumer protection with regard to STC's, as well as other, overlapping areas, was important.[1811] The Dutch government further stated that national law would form a starting point in the negotiation process at the European level, although it simultaneously indicated that it supported the idea of maximum harmonisation.[1812] In a later stage of the drafting process of the Directive, the Dutch government reported that it supported limiting the scope of the proposal as governments could not reach agreement on the regime on STC's.

At the European level, the Dutch reaction[1813] follows the advice from the CCA and the WODC and criticises the lack of empirical evidence of the claims of the Commission, and considers, with regard to the suggestion to include clauses, that it is unfamiliar with cases that would justify subjecting individually negotiated clauses to judicial control. The Dutch

[1804] C. Cauffman, M. Faure, T. Hartlief, *Harmonisatie van contractenrecht in Europa: consequenties voor Nederland*, Report 29 March 2009, WODC, available at www.wodc.nl/images/volledige-tekst_tcm44-186293.pdf.
[1805] WODC 2009, p. 142-143.
[1806] WODC 2009, p. 156-157.
[1807] WODC 2009, p. 264-270
[1808] S. Hartkamp, 'Het nieuwe BW – ontwikkelingen sinds 1992', *AA* 2012, p. 50.
[1809] WODC 2009, p. 251, 252. .
[1810] *Kamerstukken II*,2008-2009, 22112, 742, p. 7, 8.
[1811] *Kamerstukken II*, 2010-2011, 21501-30, nr 246, p. 8.
[1812] *Kamerstukken I*, 2009-2010, 30520, nr D, p. 1. The Dutch response to the previous concultation, available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/responses_green_paper_acquis_en.htm, p. 14-16 adopted a more nuanced approach to maximum harmonisation, stating that the question whether maximum harmonisation is desirable may be answered differently for different Directives, and should be based on a thorough assessment.
[1813] Dutch response, p. 7, 18-19, 19-20

response further favours a combination of a black and grey list at a European level, emphasising that this approach functions well in the Dutch legal order.

In its response, the Dutch government also stresses the importance of maintaining the level of consumer protection that currently exist in national legal orders. The option to extend the judicial control to clauses on main terms of the contract is rejected as this would entail giving the judiciary the competence to completely evaluate contracts. Interestingly, the Dutch response does not focus on previous negotiations, and emphasises experiences that may be useful for the European legal order.

Unfortunately, however, the response does not address the suggestion of comitology, although the CCA clearly rejected that option. Interestingly, article 6:239 BW provides for the amendment of articles 6:237, sub a to n BW, through delegated lawmaking, without requiring a full legislative procedure. Article 6:239 par. 2 BW moreover enables the legislator to consult representative organisations. The legislator[1814] emphasised that this provision enabled the legislator to adequately deal with developing practices, but the procedure has not been used since and amendments have been made through the normal legislative process.

Yet the existence of article 6:239 BW draws into doubt whether the Dutch legislator finds that article 6:237 BW should be amended only in a full legislative process. Notably, however, comitology would mean that national Parliament loses control over these amendments. In addition, whereas the WODC report[1815] rejected the fear of a 'race to the bottom' as not convincing, the Dutch legislator does not take a clear position on regulatory competition.

Although the Dutch government did not initiate a separate consultation, the proposal was debate in Dutch literature.[1816] The responses from other Dutch actors in the European consultation show a diverse approach to the reform of the 1993 Directive. In particular, the response from Hondius[1817] extensively considers the approaches towards the implementation of Directives in various Member States. However, the participation of other relevant actors, including Dutch consumers' organisations,[1818] has been limited to the closed consultation prior to the CCA advice.

The amount of business participating in the European consultation also seems rather limited, but these responses are in accordance with the interests of these stakehoolders. The employers' organisation VNO-NWC[1819] remarks that Directives that have not been included in review, such as Directive 2000/31 on e-commerce, may be relevant and should be included, and further argues that a sufficient, rather than a high, level of consumer protection should be established under maximum harmonisation Directives, if harmonisation is necessary. VNO-NWC further points out that the availability of evaluation reports of the Directives under review would have been beneficial. Also, VNO-NWC expressly rejects the suggestion for comitology, extending the scope of the Directive to individually negotiated clauses or the main terms of the contract. It considers, however, the possibility that maintaining a black list only would be beneficial for predictability. The Platform Detailhandel Nederland,[1820] the other business organisation that responded to the consultation, similarly

[1814] Parl GS (Inv 3, 5, and 6), p. 1756.
[1815] WODC 2009, p. 256.
[1816] See for an overview of Dutch literature M.B.M. Loos, J.A. Luzak, 'Ontwikkelingen betreffende het voorstel voor een Richtlijn consumentenrechten: de positie van de Raad en het Europees Parlement', *NTER* 2011, p. 168.
[1817] Reaction from E.H. Hondius, p. 1-3,7-9.
[1818] However, the ECC Netherlands has participated. However, its contribution seems to be limited to publishing its response to the questionnaire from the Commission on the review of the consumer *acquis*. The response is available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/responses/ecc_Netherlands.pdf.
[1819] VNO-NWC, p. 1-3.
[1820] Platform Detailhandel Nederland, p. 2

supports maximum harmonisation of the current level of consumer protection. However, the Platform rejects a clause for mutual recognition as this would entail applying stricter provisions in cross-border contracts, which would complicate cross-border trade. The Platform further supports a black list only, and rejects the suggestion that the scope of the Directive should be extended to the main terms of the contract or individually negotiated clauses.

The limited participation of Dutch stakeholders is in contrast with the contribution of stakeholders from other legal orders – for example Germany – and does not compare favourably to the contributions of businesses to national amendments.[1821] Also, the lack of participation from Dutch consumers' organisations does little to prevent or mitigate the uneven representation of actors participating in the drafting process that has already been criticised.[1822]

Because of the limited interaction between Dutch and European state and non-state actors, experiences in the implementation of Directive 93/13 were not addressed, which limits the extent to which a future reformed Directive could have responded to these experiences. Also, the lack of an additional consultation has undermined the inclusiveness and representativeness of actors in the European debate.

Although the Dutch government took Dutch law as a starting point in its participation in the European consultation, its intention in negotiations was not necessarily maintaining the status quo. Although the Dutch legislator seems more open to possibilities of reform, it does not use the draft Directive as an opportunity to reconsider the law on STC's in accordance with the recommendations of the WODC report. Considering the future reform of the 1993 Directive,[1823] the restraint of the Dutch legislator may also have been motivated by the wish to avoid multiple successive amendments of the law – however, Dutch law has meanwhile been amended.

If Dutch and European state actors do not take into account advice without clear reasons, the question moreover arises what the added value is of increased participation.

Thus, more and better interaction could have increased the chance that the national legislator raised questions and considered solutions for problems in the implementation of Directives. Consequently, the lack of interaction may undermine the responsive development of the *acquis*.

11.3.3.5. The revision of the law on STC's at a national level

In the reform of articles 6:236 and 237 BW, the approach of the Dutch legislator to interaction with other actors varies. With regard to subscription contracts, the Dutch legislator has carefully interacted with foreign and European actors, which has enabled the legislator to benefit from insights from these actors. This is much less the case with regard to the supply of gas, warmth and electricity, which may increase the chance that the law will have to be amended if relevant Directives are reformed.

Articles 6:236 and 237 BW fall within the scope of the Directive, although they do not, as such, implement the model list in the Annex to Directive 93/13. However, these provisions may entail that clauses falling under article 6:233 sub a BW, which implements article 3

[1821] For example the contributions of stakeholders to amendments to articles 6:236 and 237 BW, see further par. 11.3.3.5.
[1822] M.W. Hesselink, 'Who has a stake in European contract law?', *ERCL* 2005, p. 295.
[1823] Comp. preamble 62 to Directive 2011/83 that stipulates that in the evaluation of the Directive, the Commission will pay particular attention to the minimum harmonisation approach in Directives 93/13 and 99/44.

Directive 93/13, are considered unfair, or likely unfair. Thus, these provisions cannot be seen in isolation from the Directive.

The legislator has amended the law in two instances:

1) The amendment of articles 6:236 and 237 BW on the termination of subscriptions and similar contracts.

Article 6:236 BW was amended to stipulate, in sub o, that clauses that limit or exclude the possibility for consumer to terminate electronically, orally, or in writing contracts that have been concluded electronically, orally, or in writing are unfair. Also, sub p prohibits clauses in contracts for subscriptions on newspapers and journals that stipulate that silently extend or renew the contract for a period of more than three months, if the consumer cannot terminate the contract at the end of the contract that is renewed with a termination period of at most a month. Additionally, article 6:236 sub q prohibits clauses in contracts for subscriptions on journals or newspaper that silently extend the subscription indefinitely, if the consumer cannot terminate the contract at all times with a termination period of at most a month or three months, depending on the frequency of the newspaper or journal. Moreover, as the silent extension of memberships of associations should be handled differently as members of associations had more opportunities to influence the policy developed by associations, article 2:36 BW was accordingly amended, stipulating that unless the articles of association decide otherwise, members can terminate their membership at the end of the financial year, with a termination period of 4 weeks. Termination that diverges from par 1 end the membership at the earliest possible time, if the member would have terminated in accordance with article 2:36 par. 1 BW. Articles 3 and 4 provide exceptions and stipulates that members can terminate their membership immediately if decisions within a month after a decision limiting his rights or increasing his obligations, unless the articles of association if they specifically describe the duties and rights concerned. Members may also terminate immediately after a decision of merger, division, or conversion of the legal form of the association. The proposal made clear that associations are to clearly provide information on possibilities to terminate.[1824]

Article 6:237 BW has recently been amended to include, in sub k, clauses that set the period of contracts stipulated in article 6:236 subs j, p or q (mostly subscription contracts) are presumed to be unreasonable, unless the consumer has the possibility, after a year, to terminate the contract, with a termination period of at most a month. The amendment also amended sub l in article 237, stipulating that clauses are presumed to be unfair if they stipulate that consumers are bound to a period of termination that exceeds the period of termination that the user of STC's has to take into account.

In amending the law, the Dutch legislator[1825] considered the solutions in other Member States – notably, surrounding Member States such as England, France and Belgium, as well as Austria – that also set limits to the silent extension of contracts, or that have proposed to do so, but especially focussed on undesirable national practices.

Interestingly, neither the proposal nor the comments on the proposal initially refer to the Directive.[1826] During the negotiations on the draft Directive on consumer rights, however, the question arose whether the Dutch legislator would take the amendment into account in these negotiations, and it was noted that the Dutch government had directed its attention to the differences between the European and Dutch model lists, also taking into account the amendment. It was also noted that if the clause was not included in the Directive, it would have to be removed if the Directive aimed for maximum harmonisation.[1827]

[1824] *Kamerstukken II*, 2008-2009, 30520, nr 8, p. 21.
[1825] *Kamerstukken II*, 2005-2006, 30520, nr. 3, p. 3.
[1826] For example G.P.J. de Vries, 'Paal en perk aan bedingen ter stilzwijgende verlenging van consumentenovereenkomsten, maar hoe?', *TvC* 2007, p. 122.
[1827] Kamerstukken I, 2009-2010, 30520, nr D.

In the absence of maximum harmonisation, it can be doubted whether the Directive stands in the way of the amendments, as the amendments aim to increase the level of consumer protection in accordance with the minimum harmonisation character of the Directive. Interestingly, the amendments are in accordance with the Annex to the Directive, that in par. 1 sub h expressly refers to clauses that automatically extend a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer is unreasonably early.

The amendment is also in accordance with case law from lower courts that held clauses that silently extended contracts for ineffective,[1828] although they did not refer to the EU model list.[1829] However, other decisions have upheld these clauses.[1830] The proposal does not aim to clarify the EU model list and assumes that problems arise in practice – which is correct – and therefore, a transitional period has been introduced to allow business to amend their contracts. However, courts[1831] have anticipated on the amendment, which does not seem especially problematic considering previous decisions and the EU model list. Thus, the amendment provides more clarity for consumers as well as businesses and may eradicate inconsistent decisions of lower courts.

2) Amendments for contracts on the supply of gas, electricity, and warmth.

The amendments to legislation on the supply of gas and energy sought to extend the effect of articles 6:236 and 237 BW to contracts between businesses, particularly small to medium enterprises. Simultaneously, it was suggested to limit the character of clauses in the black list to “grey” clauses that were assumed to be unfair, also for contracts with consumers.[1832] The proposed amendment overlooked previous advice from the Raad van State, to remove a previous article of the same effect,[1833] and stated that the extension of articles 6:236 and 237 BW would enable parties contracting with suppliers of gas and electricity to negotiate. At first sight, extension of article 6:236 or article 237 BW hardly increases businesses’ room to negotiate – rather, it imposes mandatory law on parties generally considered capable of negotiating on clauses and disadvantages the users of STC’s who supply gas and energy compared to other users whose STC’s in business contracts are not subject to articles 6:236 and 237 BW. However, the extension limits the possibility of users to impose clauses on the other party, thereby providing other parties with more room to negotiate on such clauses. This restriction may further be justified by the monopolist position of suppliers of energy and gas.[1834] Simultaneously, limiting the effect of article 6:236 BW as a grey list in consumer contracts may give rise to questions with regard to the Directive, as this seems a measure that may lower consumer protection.

The amendment has been criticised as contrary to the regime in articles 6:231 et seq BW.[1835] In particular, articles 6:236 and 237 BW were drafted for contracts between consumers and businesses. Parties other than consumers were assumed to be in a position in which they could negotiate on clauses, which required less mandatory rules. This restriction also becomes apparent from article 6:235 BW that excludes big businesses from the scope of

[1828] Ktr Hoorn 10 April 2006, *NJF* 2007, 252, as well as Ktr. Eindhoven 9 March 2006, *Prg*. 2006, 95, Ktr. Eindhoven 10 November 2005, Prg. 2006, 9.
[1829] The decision in Ktr. Rotterdam 2 August 2007, *Prg*. 2008, 37 seems an exception that was not followed in later decisions, see previously par …
[1830] Ktr. Tiel 15 June 2005, *Prg*. 2005, 143.
[1831] In particular Ktr. Haarlem 12 January 2012, *NJF* 2012, 94.
[1832] *Kamerstukken II*, 2001-2002, 28174, nr 39.
[1833] *Kamerstukken II*, 2001-2002, 28190, nr 3, p. 12.
[1834] Comp. I.S.J. Houben, ‘Sectorspecifieke wetgeving en algemene voorwaarden’, *NbBW* 2004, p. 107-108 remarks that the market for energy and gas is new and there may be market failures. Moreover, parties contracting for the supply of energy and gas are typically dependant on the supply of these utilities.
[1835] S.C.J.J. Kortmann, N.E.D. Faber, ‘Het moet niet veel gekker worden!’, *WPNR* 6531 (2003).

articles 6:233 and 234 BW.[1836] Subsequently, questions were raised in Parliament.[1837] The state secretary,[1838] after agreeing with the negative advice from the Raad van State, subsequently found that the advice of the Raad van State has been elaborately discussed in Parliament, which has resulted in current article 14 Gas Act (‘*Gaswet*’) and article 26a Electricity Act (‘*Elektriciteitswet*’) that have maintained the extension and limitation of articles 6:236 and 237 BW.[1839] The state secretary concluded that these articles are not contrary to articles 6:231 et seq BW.

The secretary[1840] further found that the limitation of black clauses to grey clauses does not materially alter the position of consumer, because it is highly unlikely that businesses will succeed in proving that these are fair, as these clauses are found unfair throughout this sector. Thus, the amendment is in accordance wirh Directive 93/13 or article 3 par. 3 Directive 2003/55 that stipulates that states will ensure a high level of consumer protection.[1841] These amendments have since been extended to contracts for the delivery of warmth falling under the Warmth Act (‘*Warmtewet*’) that in proposed article 5 par. 9 provides for similar divergences from articles 6:236 and 237 BW.[1842]

Criticism that the amendment is contrary to Directive 93/13 may be debated after a recent CJEU decision.[1843] The CJEU held that clauses falling under the scope of national legislation are, in accordance with article 1 par. 2 Directive 93/13, not subjected to an evaluation of fairness, as the legislator has specifically considered a balance of the rights and obligations of contract parties in these cases.

►Thus, although the Dutch legislator recognises the added value of foreign and European law, as well as national legal practice, it has not developed a predictable, consistent approach to amending the law. If amendments are not uncontroversial or if they precede law reform at the European level, the Dutch legislator may be forced to amend the law repeatedly, which does not strengthen predictability or accessibility.

11.3.3.6. Conclusion on the development of Dutch law and harmonisation

The approach of the Dutch legislator is reminiscent of the German legislator who actively participates in debate and subsequently exercises restraint in the implementation of the law on STC’s. However, the approach of the German legislator has not been nearly as successful as the German approach. Possibly, this lack of success can be traced to the weaker position of Dutch actors in the European debate, as Dutch law had not even entered into force yet, whereas German law was well-developed.

The timing of Directive 93/13 also entailed that it was especially unattractive for the Dutch legislator to amend the law. As the restraint of the Dutch legislator went further than the restraint of other legislators, it drew the attention of European actors, and the ability of national actors to exercise restraint in the implementation of European measures, which also benefitted the predictable development of the law, was curtailed.

[1836] Advice from the Raad van State of 19 September 2000, nr W10.00.0327/II.
[1837] *Kamerstukken II*, 2002-2003, 28174, nr 110a, p. 8-9.
[1838] *Kamerstukken II*, 2002-2003, 28174, nr 110b, p. 11-12.
[1839] *Kamerstukken II*, 2002-2003, 28174, nr 110d, p. 3.
[1840] *Kamerstukken II*, 2002-2003, 28174, nr. 110d, p. 3.
[1841] Specifically, the article provides a high level of consumer protection ‘particularly with respect totransparency regarding general contractual terms and conditions, general information and dispute settlement mechanisms. Member States shall ensure that the eligible customer is effectively able to switch to a new supplier.’ The article further refers to Annex A to the Directive that establishes that provides more specific rules for contracts between consumers and gas suppliers.
[1842] As discussed in *Kamerstukken I*, 2008-2009, 29048, nr 51, p. 7-9.
[1843] CJEU 21 March 2013 (RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV), C-92/11, [2013] ECR, p. I-0.

The predictable, accessible and consistent development of the law was further undermined as the Dutch legislator has not exercised similar restraint in amending the law, even though recodification was meant to increase the stable and consistent development of private law.

Both German and Dutch courts have followed the restraint of legislators in implementing the *acquis*. However, in the Dutch legal order, this was more problematic as the law on STC's showed more shortcomings that were not compensated by an active approach of the courts. Moreover, Dutch courts have not adopted a consistent approach, as lower courts have diverged from the approach of the Hoge Raad.

Thus, Dutch actors have not adequately recognised interdependence in ensuring the predictability, consistency, accessibility, and responsiveness of the law on STC's, despite the CJEU decision in Commission/The Netherlands. Consequently, Dutch actors have not consistently interacted with European, foreign and national state and non-state actors, which has undermined the comprehensibility of the law.

11.3.4. Dutch law on STC's and international trade

The development of treaties and international trade may induce state actors to interact with foreign actors and non-state actors. Is this also the case for the Dutch legislator and courts, and how has that affected the predictability, consistency, accessibility and responsiveness of the law on STC's?

Paragraph 11.3.4.1. will consider the regulatory competition in Dutch law and paragraph 11.3.4.2. will turn to the approach of the courts to the interpretation of clauses in international contracts. Paragraph 11.3.4.3. will end with a conclusion.

11.3.4.1. Regulatory competition

Has the Dutch legislator taken into account insights from foreign, European and international actors in developing the law on STC's in accordance with ideas of regulatory competition?

The Dutch legislator has recognised the added value of regulatory competition in the law on STC's.

In accordance with the idea of regulatory competition, the drafting of the BW relied extensively on comparative law, which enables the drafters of legislation to decide on the most convincing argument for and against the development of the law in a particular direction.[1844] Notably, however, the inclusion of comparative law did not focus on foreign regimes with the lowest possible evaluation of clauses in business contracts, which was also criticised by Spier.[1845]

In addition, in the drafting of articles 6: 231 et seq BW, the view of relevant actors in legal practice were carefully considered. Thus, the legislator consulted with the Dutch association for the judiciary[1846] on questions of transitional provisions, which should limit unpredictability arising from the introduction of new legislation that moreover confers a relatively new task on the judiciary. Furthermore, the legislator clearly stated the importance of the advice from the CCA[1847] and business stakeholders.[1848] This attention for national stakeholders increases the chance that Dutch law will reflect the eneds of businesses and is

[1844] See previously par. 11.3.1.
[1845] J. Spier, 'Nogmaals het wetsontwerp algemene voorwaarden', *Kwartaalbericht Nieuw BW* 1985, p. 7-8.
[1846] Such as the Nederlandse Vereniging voor rechtspraak (Parl GS (Inv 3, 5, and 6), p. 1463,
[1847] Parl GS (Inv 3, 5, and 6), p. 1451, 1456-1457.
[1848] Parl GS (Inv 3, 5, and 6), p. 1453, 1472.

therefore an attractive regime for these businesses that are thus les slikely to opt out of Dutch law.

The support of regulatory competition becomes particularly visible for international business contracts. In the drafting process, the Dutch legislator argued that subjecting international business contracts to the Dutch regime might be problematic, and might jeopardise the Dutch position in international trade.[1849] Accordingly, the Dutch legislator has chosen not to subject international business contracts to judicial evaluation by the insertion of article 6:247 par. 1 BW, stating that doing so would hinder international trade.[1850] The Dutch legislator further states that it should not be made unattractive for Dutch contract parties to opt for international trade.[1851]

However, this view is limited to international business contracts, which was subsequently criticised by Spier,[1852] who argued that in chains of contracts, the regime would not be applicable to a part of the contractual chain, if the contract would be concluded between a Dutch and a foreign business. However, the subsequent link of the chain – a contract between Dutch businesses – would be subjected to this regime. The Dutch legislator apparently did not consider this argument, which would provide domestic businesses with a possibility to circumvent the regime, particularly persuasive.[1853]

Also, considerations of regulatory competition are not apparent in recent reforms for consumer contracts. These amendments focus on national practices. Notwithstanding the emphasis of the Dutch legislator on regulatory competition in this field, it has been argued that other areas of the law – in particular battle of forms – are in need of reform.[1854]

Thus, the Dutch legislator initially recognised the increasing relevance of the preference of non-state actors in international trade and sought to develop an attractive system for these actors, in accordance with the idea of regulatory competition. However, this view has not consistently been followed in recent amendments. Although this development was not based on interaction with international or European actors, the Dutch legislator has taken into account insights from foreign legislators and national stakeholders. Moreover, a more lenient regime has been developed for international practice.

11.3.4.2. The interpretation of international contracts

Has the judiciary, in the interpretation of STC's in international contracts, recognised interdependence as international trade develops and have courts interacted accordingly with international, European and foreign state and non-state actors? How has that affected the predictability, consistency, accessibility and responsiveness of the law on STC's?

Paragraph 11.3.4.2.1. will consider decisions on the inclusion of STC's and paragraph 11.3.4.2.2. will consider the decisions on the question whether STC's have been made adequately available. Paragraph 11.3.4.2.3. will consider the interpretation of STC's. Paragraph 11.3.4.2.4. will end with a conclusion.

[1849] J. Spier, 'Het wetsontwerp algemene voorwaarden: voor de praktijk funest', Kwartaalbericht Nieuw BW 1984, p. 130-131.
[1850] Parl. GS (Inv 3, 5, and 6), p. 1815.
[1851] Parl GS (Inv 3, 5, and 6), p. 1816, see also with regard to article 6:232 p. 1486.
[1852] J. Spier, 'Nogmaals het wetsontwerp algemene voorwaarden', *Kwartaalbericht Nieuw BW* 1985, p. 7, similarly J.E. Vollebregt, 'Wetsonwerp algemene voorwaarden', *NJB* 1984, p. 813814.
[1853] Comp. the reaction of the Minister, Parl GS (Inv 3, 5, and 6), p. 1484 with regard to the discussion (in an international context see p. 1478, and 1482) whether the regime would be detrimental to businesses, as argued by Vollebregt 1984, p. 809. Comp. also HR 26 May 1989, *NJ* 1992, 105 where the Hoge Raad limited the ability of parties in domestic contracts to exclude national mandatory law by opting for an international regime that aims to provide a comprehensive regime on some points, such as the CMR.
[1854] C.P.B. Mahé, 'Pleidooi voor de herziening van de nederlandse battle of forms-regeling', *VrA* 2006, p. 5.

11.3.4.2.1. The valid inclusion of STC's

Courts have not consistently and adequately interacted with national, European, foreign and international state and non-state actors in the inclusion of STC's in cases falling under respectively the CISG, the CMR, article 23 Brussels I, and Dutch law, which has severely undermined predictability and consistency.

- In cases falling under the CISG, the Hoge Raad has decided in accordance with the CISG, without referring to foreign law or international materials, but the conclusion of the A.G. does refer to international materials.

In a 2005 decision under the CISG, the Hoge Raad[1855] held that the question whether STC's had been validly included in the contract, was to be decided under article 7 par. 2 CISG, in accordance with general principles underlying the CISG, and in the absence of such principles, in accordance with applicable law, as the CISG includes rules on the conclusion of contracts, including the question whether parties have agreed with the application of STC's. Neither the Hoge Raad nor the A.-G. refers to foreign decisions on the inclusion of STC's, but A.-G. Strikwerda does refer to literature on the CISG and UNCITRAL.

- A consistent approach does not become apparent in the approach of lower courts.

Decisions from lower instances prior to the 2005 decision had referred to foreign law, although foreign law was not considered extensively, but merely mentioned.[1856] Lower courts[1857] have since followed the decision of the Hoge Raad. Other decisions from lower courts have not decided the question whether STC's had been validly included in the contract under article 7 CISG. For example, the district court Amsterdam[1858] decided the question whether a choice of law clause had been validly included under article 3 Rome Convention.

- In cases falling under the CMR, the Hoge Raad has referred to both international and foreign materials.

The Hoge Raad[1859] held that in order to decide whether validity of the jurisdiction clause under article 31 CMR should be determined under the CMR or not, it should first be established that the CMR was applicable to the case, which concerned transport through multiple means. The Hoge Raad considered the scope of the CMR, referring to provisions and agreement of states parties to the CMR to negotiate on treaties for transport through other means, and considered that it followed that the CMR is not applicable to these contracts. In its decision, the Hoge Raad addressed English and German case law that the court of appeal of appeal had relied on, and followed the BGH decision, stating that it did not follow from the reasoning of the English decision that the CMR should be applicable. Consequently, the Hoge Raad upheld the jurisdiction clause as not invalid because of article 31 CMR.

[1855] HR 28 January 2005, *NJ* 2006, 517, see the conclusion of the A.-G. Strikwerda under pars. 8 and 9.
[1856] For example Rb. Arnhem 17 March 2004, *NJF* 2004, 497, also Rb Zwolle 22 January 2003, *LJN* AF3345, referring to applicable Dutch law as well as German law, as well as Hof 's-Hertogenbosch 16 October 2002, *LJN* BA7248, referring to the PECL and UNIDROIT, as well as (briefly) to Dutch and French law.
[1857] For example Hof 's-Hertogenbosch 2 January 2007, *LJN* AZ6352, not referring to foreign law.
[1858] Rb. Amsterdam 20 April 2011, *RCR* 2011, 69. S. Kruisinga, 'De battle of forms in internationaal perspectief: een eerlijke strijd?', *Contracteren* 2005, p. 5 refers to decisions in which courts held that questions on battle of forms should be determined under article 6:225 par. 3 BW.
[1859] HR 1 June 2012, *NJ* 2012, 516.

- The approach of lower courts varies. Whereas some lower courts have decided cases accordingly and also refer to foreign materials,[1860] other courts have decided cases under Dutch law.[1861]
- Some cases may however be problematic, even though they refer to foreign and international sources as well as soft laws.

The district court Rotterdam[1862] considered Rome I, Brussels I, the CMR and Dutch.

The court rejected the claimant's referral to the applicability of the CMR because this constitutes changing the legal basis of one's claim in the sense of article 130 Civil Procedure Act ('Rv'), which is not permissible in the preliminary procedure on competence.

However, the court overlooks that article 31 CMR provides that parties may agree on a competent court in contracting states, while, in addition, the court where the defendant ordinarily resides or has his principal place of business, or the branch or agency through which the contract of carriage was made is competent, or the court of the place where the goods were taken over by the carrier or the place designated for delivery is situated, which in this case would entail that the court in The Hague is competent.

Thus, this decision overlooks previous CJEU[1863] case law providing that in accordance with article 71 Brussels I, this provision precedes article 23 Brussels I, provided that it is 'highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimised and that they ensure, under conditions at least as favourable as those provided for by the regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the European Union', while application of the CMR may also not lead to a result less favourable than the result reached under the Regulation.

If this is not the case – which the court does not explain further – then the question whether a jurisdiction clause has been validly included in the contract is to be determined under article 23 Brussels I. Although the court refers to article 23 Brussels I, the question whether STC's have validly been included in the contract is decided under Dutch law, as the court apparently confuses a choice of law with a choice of jurisdiction. Holding that the STC's of respondent have been validly included in the contract, which contains a jurisdiction clause for an Italian court, the court declares itself incompetent, without however evaluating whether this choice has validly been made under article 23 Brussels I. This decision contradicts CJEU case law.[1864]

- In cases on jurisdiction clauses in accordance with article 23 Brussels I, lower courts have decided in line with the Regulation, but they only rarely[1865] refer to international and European materials.

The court of appeal in 's-Hertogenbosch[1866] upheld a clause, although in writing, had not been given a prominent place in the STC's, but the court upheld the clause as jurisdiction clauses were not unusual in international trade, while the party challenging the clause had also included a jurisdiction clause in its own STC's. Parties had entered into multiple contracts that they had also begun to perform, in which the jurisdiction clause was also deemed to have been validly included under article 17 Lugano Convention. The court did not refer to European or foreign decisions.

[1860] Comp. Hof 's-Gravenhage 28 November 2007, *LJN* BB9150 that upheld the applicability of the CMR, also noting that the STC's of parties expressly noted that the CMR could be applicable. The court also referred to German literature on the CMR.
[1861] Rb. Rotterdam 17 September 2008, *LJN* BF1813 held that it was insufficiently established that the STC's, recognising the applicability of the CMR and containing a clause for arbitration, had been included in the contract under Dutch law.
[1862] Rb. Rotterdam 28 January 2009, *LJN* BH1797.
[1863] CJEU 4 May 2010 (TNT/Axa Versicherung), C-533/08, [2010] ECR, p. I- 4107.
[1864] CJEU 16 March 1999 (Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA), C-159/97, [1999] ECR, p. I-1597.
[1865] See Hof Amsterdam 27 November 2007, *RCR* 2008, 44 that rejected that a jurisdiction clause met the requirements of article 23 Brussels I, expressly following the CJEU
[1866] Hof 's-Hertogenbosch 4 September 1997, *NJ* 1998, 578.

The district court Dordrecht[1867] upheld a jurisdiction clause, firstly considering that STC's had been validly included in the contract as the confirmation of the commission referred to the STC's, which were printed on the back of the confirmation, in English, and the user of STC's had therefore justifiably assumed that the counterparty accepted its STC's, in accordance with Hoge Raad case law. The court subsequently held that as no further objections had arisen to the jurisdiction clause, and the STC's had been validly included in the contract, on which parties commercial practice was based, the jurisdiction clause had been validly included in the contract, in accordance with article 23 Brussels I. The court did not expressly refer to the CJEU or to foreign or international materials. The district court Rotterdam[1868] referred to article 23 Brussels I in a case concerning a jurisdiction clause, but first turned to the interpretation of the clause and subsequently held that as the jurisdiction clause met the requirements under article 23 Brussels I and other objections had not arisen, it was valid.

- Some decisions referring to international, foreign and national decisions, as well as soft law, are nevertheless problematic.

The district court Amsterdam[1869] decided on the inclusion of a jurisdiction clause under the CISG, and referred to both the decision of the Hoge Raad on the valid inclusion of STC's under the CISG as well as the BGH and the PECL, ruling that STC's had not been validly included in the contract as it had not been established that the users of STC's had made the text available to their contract party, noting that a general duty to inform after the STC's cannot be accepted, while merely referring to one's STC's is not sufficient and does not indicate agreement or a well-established practice between parties.

The district court 's-Hertogenbosch[1870] similarly incorrectly decided on the applicability of a jurisdiction clause under the CISG, referring to article 23 Brussels I, but subsequently stating that this regulation does not provide rules for the valid inclusion of STC's. The court then considered this question, and, referring to BGH case law as well as an Austrian decision, held that this had not been the case, which also meant that the jurisdiction clause did not meet the requirements of article 23 Brussels I. Although the outcome of the case is unproblematic, the reasoning of the court is contrary to CJEU case law[1871] establishing that the validity of a jurisdiction clause is to be established solely under article 23 Brussels I.

- In international cases decided under Dutch law, the Hoge Raad has not referred to international or foreign materials.

In a 1977 international case decided under Dutch law, the Hoge Raad[1872] rejected the view that because the Dutch seller, in a contract drafted in English, had referred to his STC's, printed on his stationary, in Dutch, these STC's had become applicable, unless the party subjected to these terms proved otherwise. In this decision, the Hoge Raad, nor the diverging conclusion from the A.-G., refer to foreign or international decisions.

In a 1985 decision, the Hoge Raad[1873] however decided that a retention of title clause that had not been included in the confirmation of an assignment between parties but that had been included in the STC's in the stationary of the seller, had not been validly included in the contract, notwithstanding the long business relation between contract parties, as the buyer did not reasonably have to expect a

[1867] Rb. Dordrecht 16 January 2008, RCR 2008, 50.
[1868] Rb. Rotterdam 1 August 2007, *LJN* BB6035.
[1869] Rb. Amsterdam 3 June 2009, *LJN* BK0976. Comp. also Rb. Zutphen 14 January 2009, *NJF* 2009, 244, referring to both the Hoge Raad and the BGH.
[1870] Rb. 's-Hertogenbosch 26 January 2011, *RCR* 2011, 52. Similarly, the Hof 's-Hertogenbosch 22 June 2012, *RCR* 2010, 66 also decided the question whether STC's – including a jurisdiction clause – had been validly included in the contract under the CISG rather than article 23 Brussels I.
[1871] CJEU 16 March 1999 (Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA), C-159/97, [1999] ECR, p. I-1597.
[1872] HR 9 December 1977, *NJ* 1978, 187.
[1873] HR 18 October 1985, *NJ* 1987, 189.

clause that had not been included in his confirmation, and the seller could not reasonable expect the buyer to have become aware of this clause.

In a 2001 case,[1874] for a contract concluded before the CISG had been ratified by the Dutch legislator, the Hoge Raad upheld a decision from the court of appeal ruling that an arbitration clause had been validly included in a contract. The Hoge Raad held that the German contract party should have asked for clarification on the Dutch pre-printed text sent by the Dutch party upon request of the German party to send his STC's. The German party, as a business operating in international trade, should been alert to this way of referring to STC's that is also used by German contract parties. A.-G Strikwerda notes that this conclusion is in line with previous case law on domestic contracts. Neither the Hoge Raad nor the A.-G refer to German law.

►As the Hoge Raad has adopted a different approach for contracts concluded under the CISG, it is unclear whether this decision should be followed for international sales contracts – it may however still be relevant for international contracts where the CISG has been excluded or for international contracts not falling under the CISG, such as mixed contracts.

- Decisions in national cases only rarely refer to foreign materials[1875] and they differ from decisions in international cases.

In national cases, the question whether STC's have been validly included under the contract should be answered under articles 3:33 and 35 BW. Although these rules at first sight seem more lenient than international regimes, some confusion has arisen with regard to clauses that are particularly disadvantageous for the contract party subjecting to the STC's.

In a 1981 decision, the Hoge Raad[1876] had held that for the valid inclusion of STC's, there were no additional requirements beyond the normal requirements usual in business practices for concluding a contract. The Hoge Raad however also held that the agreement cannot supposed to be aimed at clauses that were especially disadvantageous, which it repeated in a later decision.[1877] Although the Hoge Raad in this domestic contract unsurprisingly does not refer to comparative or foreign sources, the converging conclusion of does refer to research that includes comparative research and takes note of European decisions on jurisdiction clauses. The Hoge Raad[1878] repeated that notwithstanding the applicability of STC's, the silent agreement of the subjecting party with terms, the content of which he is not completely familiar with, may not be assumed for clauses on far-going exclusion clauses that the court of appeal had deemed applicable because of their widespread use in that particular branche of business. Even if such clauses are widespread, the Hoge Raad maintained that agreement should not be assumed. Rather, this question should be decided by interpreting the contract.

It can be doubted whether these decisions under 'old' Dutch law are reconcilable with article 6:232 BW. In later decisions, the Hoge Raad[1879] maintained the applicability of articles 3:33 and 35 BW in deciding whether STC's had validly been included in the contract, without however confirming the idea that counterparties cannot be held to have agreed with surprising or unusual clauses.

►Thus, courts have not developed a consistent approach to international and foreign materials in international cases. In some cases, referral to multiple sources does not indicate a carefully reasoned out decision, but rather confusion. The lack of interaction between

[1874] HR 2 February 2001, *NJ* 2001, 200 see the conclusion of A.-G. Strikwerda, par. 10. Comp. also Rb. Rotterdam 28 November 2012, *NJF* 2013, 79, on the silent acceptance of terms.
[1875] Comp. however the conclusion of A.G. A.-G. Biegman-Hartogh before HR 6 November 1992, *NJ* 1993, 27.
[1876] HR 20 November 1981, *NJ* 1982, 517.
[1877] HR 6 November 1992, *NJ* 1993, 27.
[1878] HR 1 July 1993, *NJ* 1993, 688.
[1879] HR 10 June 1994, *NJ* 1994, 611, HR 28 November 1997, *NJ* 1998, 705, as well as HR 2 December 2011, *NJ* 2011, 574, as well as Hof 's-Hertogenbosch 1 November 2001, *NJ* 2002, 507.

Dutch courts could have prevented the development of inconsistent, unpredictable, or incorrect decisions.

11.3.4.2.2. Making STC's adequately available

The approach of courts to international and foreign materials in decisions on the availability of STC's differs, which has undermined the predictability, consistency and responsiveness of the law on STC's.

- Various decisions of lower courts[1880] on the availability of STC's in international cases under the CISG refer to a decision from the BGH.[1881]

These decisions include the district court Rotterdam[1882] that referred to the BGH while stating that a 2001 decision from the Hoge Raad could not serve as a starting point in its decision, as the Hoge Raad decision concerned a case in which the CISG was not (yet) applicable.[1883] The district court Utrecht[1884] also referred to the BGH decision, and moreover distinguished between the inclusion of STC's in international contracts and domestic contracts. Unfortunately, however, some comments and case law on the BGH decision seem to be referring to the wrong publication.[1885]

- Other decisions from lower courts do not refer to the BGH.

Thus, the district court Rotterdam, [1886] in multiple decisions, does not refer to the BGH but instead refers to the 2005 decision of the Hoge Raad on the valid inclusion of STC's, as well as the district court Arnhem.[1887] In a previous case, the district court Arnhem[1888] did not refer to either the decision of the Hoge Raad or the BGH. Instead, the district court decided the inclusion of STC's under article 7 par. 2 CISG, stating that a contract party cannot merely refer to the STC's without making the text of STC's available, while it can generally not be required of contract parties to inform after the content of STC's.

Similarly, the district court Zwolle[1889] held that it has not been sufficiently proven that the text of STC's were made available to the German counterparty, without referring either to the Hoge Raad or the BGH. Additionally, the district court Breda,[1890] though recognising the need for a harmonised interpretation of the CISG, did not refer to either the decision of the BGH or the Hoge Raad, and

[1880] As there are no relevant decisions of the Hoge Raad on the availability of STC's, this paragraph will mainly consider lower courts decisions. However, the importance of uniform interpretation had been emphasised for the predecessor of the CISG, see HR 13 September 1991, *NJ* 1992 110.
[1881] BGH 31 October 2001, *NJW* 2002, 1651. See critically T.H.M. van Wechem, J.H.M. Spanjaard, 'De toepasselijkheid van algemene voorwaarden onder het Weens Koopverdrag: Nieuwe trend in de Nederlandse (lagere) rechtspraak?', *Contracteren* 2010, p. 35, 38, who find this decision incorrect – inconsistent with foreign decisions, and too much oriented on national law. In contrast, S.A. Kruisinga, 'Reactie op T.H.M. van Wechem en H.J.M. Spanjaard', *Contracteren* 2010, p. 110, does find the 2001 BGH decision persuasive, especially the reasoning of the BGH and the outcome of the case. She also argues that the BGH has not oriented itself on German law that she finds considerably less strict. German criticism of this decision has come to the same conclusion, see previously par. 10.3.3.2.3.
[1882] Rb. Rotterdam 25 February 2005, *LJN* BH6416.
[1883] HR 3 May 2013, *RvdW* 2013, 669 does not provide a further rule but is rejected on the basis of article 81 RO.
[1884] Rb. Utrecht 21 January 2009, *NJF* 2009, 148.
[1885] Curiously, BGH 31 October 2001, *NJW* 2002, 1651 concerned a question on article 19 and 7 CISG on battle of forms. It was not a decision on the question whether the STC's had been made adequately available. A decision on the same date under article 8 CISG, on the question whether STC's had been made adequately available, was BGH 31 October 2001, *NJW* 2002, 370. Kruisinga does refer to this decision. Comp. Rb. Arnhem 23 May 2012, *LJN* BW7459, referring to case of 31 October 2001, VIII ZR 60/01, *NJW* 2002, 1651 the case number, VIII ZR 60/01, however refers to the decision published under *NJW* 2002, 370. Similar references also in Rb. '-Hertogenbosch 28 March 2012, *LJN* BW0028. In a later decision, this court (Tb. 's-Hertogenbosch 1 August 2012, *RCR* 2012,78, cites from the decision of the BGH under *NJW* 2002, 370, but does not refer expressly to the *NJW* anymore.
[1886] Rb. Rotterdam 29 December 2010, *LJN* BP1037, Rb. Rotterdam 31 March 2010, *LJN* BN2112,
[1887] Rb. Arnhem 10 February 2010, *LJN* BL4484, similarly Rb. Arnhem 17 January 2007, *LJN* 9279.
[1888] Rb. Arnhem 16 December 2009, *LJN* BK8904.
[1889] Rb. Zwolle 9 December 2009, *LJN* BL0104.
[1890] Rb. Breda 27 February 2008, *LJN* BC6704.

concluded, under articles 8 and 9 CISG, that STC's were validly included in the contract, as the party subjected to the STC's should have realised that in international as well as national trade, the use of STC's is widespread. As the STC's had been printed on the back of the stationary of the user, and the counterparty had not protested against these STC's and had started to perform the contracts, the user was allowed to assume that the STC's had been accepted. Thus, the silence of the counterparty did not stand in the way of assuming the applicability of STC's under article 18 CISG.

A decision made in arbitration,[1891] although referring to the PECL, does not refer to either the Hoge Raad or the BGH but holds that as the party subjecting to STC's had not protested the application of STC's, while the intention of the user was sufficiently clear and a reasonable person acting in international trade would have understood that the seller meant to apply his STC's, and the text of the STC's had been mailed by regular mail, the buyer had accepted the STC's, although this did not apply for the initial contract, concluded by fax, on which the text of STC's was not printed.

- In cases under Dutch law, article 6:247 BW makes clear that articles 6:233 sub b and article 6:234 are not applicable. Thus, for international cases, a lacunae has developed.

A 2012 decison of the Hoge Raad, which did not refer to foreign or international materials, did not provide clarity on this point.[1892] The conclusion of A.-G. Wissink before the case that elaborately considers the answer to this question by soft law, the CISG, and BGH case law., also does not provide an unequivocal answer and moreover fails to consider Directive 2000/31.

- In domestic cases, the Hoge Raad has generally not referred to European, foreign or international materials, but recognised the relevance of business practices. It does not become apparent that the courts have consistently decided these cases more strictly than international cases, even though article 6:247 BW clearly distinguishes between national and international cases.

The Hoge Raad has decided that article 6:234 BW should be interpreted in a limited manner, which entailed that the user of STC's can only refer to the availability of STC's at the registry of the court or the possibility to send the text of the STC's upon request, if there are no other options to make the STC's available.

However, the Hoge Raad[1893] held that an interpretation in accordance with the needs of practice entails that the party subjecting to the STC's may not invoke the avoidability if, at the time of the conclusion of the contract, he was familiar with the content of the STC's or should have been familiar, which would for example be the case if STC's have been included in multiple contracts between parties, the text of which has been handed to the party subjecting to STC's, while it is also possible that invoking the avoidability of STC's is irreconcilable with good faith under article 6:248 BW.

In a subsequent case, the Hoge Raad[1894] accepted that in accordance with civil procedure law, the court had apparently assumed that STC's had been made available in accordance with article 6:234 BW.

In a 2011 decision, the Hoge Raad[1895] held that by merely making the STC's available online, where they could be found through a Google-search, STC's had not been made adequately available.

In international cases, however, the thought that business parties ought to be aware of the widespread use of STC's[1896] has also been reflected in some domestic cases.[1897]

[1891] NAI 10 February 2005, http://cisgw3.law.pace.edu/cases/050210n1.html.
[1892] HR 11 May 2012, *NJ* 2012, 318, comp. The conclusion of A.-G. Wissink under pars. 3.8.2-3.8.5.
[1893] HR 1 October 1999, *NJ* 2000, 207, HR 6 April 2001, *NJ* 2002, 385.
[1894] HR 21 September 2007, *NJ* 2009, 50, comp. previously also HR 11 July 2008, *NJ* 2008, 416.
[1895] HR 11 February 2011, *NJ* 2011, 571.
[1896] Expressed for example in HR 16 February 1996, *NJ* 1996, 394.
[1897] HR 19 December 1986, *NJ* 1987, 947.

►Neither lower courts nor the Hoge Raad has developed a consistent approach in referring to international, European or foreign materials in international cases, nor do lower courts consistently take into account one another's decisions. This has undermined the predictability and consistency of the law on STC's. Moreover, the responsiveness of the law on STC's to international practice is lessened as lacunaes become visible that are not remedied by the courts.

11.3.4.2.3. The interpretation of clauses

Courts have not distinguished between the interpretation of clauses in domestic or international contracts, nor have they especially taken into account foreign or international materials in interpreting clauses in these contracts. In other words, foreign or international materials do not take a special place in the interpretation of international clauses. A consistent approach to the place of foreign and international materials in the interpretation of clauses in international contracts would however benefit predictability, accessibility consistency, and responsiveness.

- International contracts are interpreted in line with domestic case law.

The Hoge Raad[1898] in the interpretation of an international contract containing an entire agreement clause, held that the court of appeal had rightly interpreted the contract in accordance with a leading domestic case of the Hoge Raad,[1899] according to which a contract is to be interpreted in accordance with the reasonable expectations of parties. The court of appeal had taken a linguistic interpretation as a starting point, holding that this contract had been carefully negotiated and drafted, and moreover included an entire agreement clause. In the interpretation of the contract, the court also referred to the negotiation process of the contract.

The Hoge Raad does not refer to foreign or English law, in which this clause is well-known, and A.-G. Timmerman only briefly refers to English law. In his note to the decision, Wissink[1900] finds that the entire agreement clause does not prescribe how the terms in the contract are to be interpreted, nor does he find it in accordance with Dutch law, as well as the PECL and the UNIDROIT principles, to bar the negotiation process from circumstances relevant for the interpretation of the wording of the contract.

In a 2013 domestic case, the Hoge Raad[1901] did recognise the function of entire agreement clauses under English law, but maintained that such clauses do not have special meaning under Dutch law.

In a case involving foreign parties, the Hoge Raad [1902] similarly referred to guidelines established in domestic case law.[1903]

- However, this line also permits courts to take into account parties' expectations, in which case foreign or international materials might become relevant.

[1898] HR 19 January 2007, *NJ* 2007, 575, see later also HR 19 October 2007, *NJ* 2007, 565, where the Hoge Raad held that parties should take the legitimate interests of counterparties into account, as well as HR 4 June 2010, *NJ* 2010, 312, where the Hoge Raad emphasized the capacity of professional parties, and HR 5 April 2013, *NJ* 2013, 214, where the Hoge Raad held that the linguistic interpretation provided a starting point for judges in interpreting the contract, but other circumstances can entail that another meaning than the linguistic meaning of the contract can be decisive.
[1899] HR 13 March 1981, *NJ* 1981, 635.
[1900] Note to HR 29 June 2007, *NJ* 2007, 576, par. 8.
[1901] HR 5 April 2013, *NJ* 2013, 214, see also the conclusion of A.G. Timmerman under 3.13, followed by Hof Leeuwarden 21 May 2013, *NJF* 2013, 298..
[1902] HR 29 June 2007, *NJ* 2005, 576.
[1903] HR 20 February 2004, *NJ* 2005, 493.

The Hoge Raad[1904] expressly considered that the expectations from parties, when established, could justify an interpretation that took these expectations rather than the wording of the contract into account.

Accordingly, the Hoge Raad [1905] also upheld a decision from the court of appeal that emphasised the importance of the English wording of an initial public offering, as most parties participating in the agreement were assisted by professionals, and were situated in England or the US and the agreement was the result of extensive negotiations. In a subsequent decision, [1906] an interpretation based on the wording was difficult as the wording ('net proceed') allowed for multiple meanings. The Hoge Raad upheld the decision from the court of appeal that took into account the relevant circumstances of the case, including the drafting of the clause, the wording of the clause and parties' intentions.

In other cases, however, the Hoge Raad[1907] held that the court of appeal should also consider the argument that in shipping, the expression "as agents" had a particular meaning diverging form the meaning established by the court. Thus, parties' expectations and definitions generally recognised in trade may well be relevant.

- Lower courts similarly interpret international cases in accordance with domestic law.

The district court Rotterdam[1908] followed the line set out by the Hoge Raad, expressly referring to parties' reasonable expectations. The decision of court of appeal Arnhem makes clear that international guidelines may influence parties' expectations.[1909]

The district court Haarlem,[1910] deciding a case under Dutch law, held that the term 'negligence' should be interpreted in a way that is in accordance with Dutch law, and as comparative law showed that negligence converged with the Dutch 'unlawfulness' in article 6:162 BW, negligence would be interpreted in accordance with this article.

►The guidelines established by the Hoge Raad allow judges to take into account the capacity of international parties, and, possibly, their expectations as based on international materials, which leaves room for a responsive interpretation. However, applying a domestic standard to international transactions may not be in accordance with the international character of that transaction, which might undermine responsiveness. For foreign parties, moreover, the decisions from the Hoge Raad are arguably not easily accessible and the lack of a consistent approach may give rise to unpredictability for international parties.

So far, however, referring to foreign law or international materials has been the exception rather than the rule. Taking into account foreign and international materials might form a starting point for developing a separate approach to the interpretation of clauses in international clauses that might benefit responsiveness to international trade

11.3.4.2.4. Conclusion on the interpretation of international contracts

Although the law clearly distinguishes between international and national contracts, courts have not expressly recognised the needs and preferences of international trade. Thus, courts have not developed a consistent approach to international, European, foreign and national state and non-state actors. Interestingly, whereas German courts do not generally refer to

[1904] HR 19 November 2010, *NJ* 2010, 623.
[1905] HR 9 April 2010, *JOR* 2010, 179.
[1906] HR 18 November 2011, *RvdW* 2011, 1422.
[1907] HR 26 October 2001, *JOR* 2001, 275.
[1908] Rb. Rotterdam 4 February 2009, *RCR* 2009, 42.
[1909] Comp. Hof Arnhem 9 Marc 2010, *LJN* BL7399, a rare case that referred to the CISG Advisory Council Opinion nr 2.
[1910] Rb. Haarlem 11 May 1993, *NJ* 1993, 71.

soft law, Dutch courts have referred to both the PECL and UNIDROIT. This has not visibly contributed to the comprehensibility of the law.

The absence of a consistent use of international and foreign materials, especially in international cases decided under Dutch law, may have undermined the consistency and predictability of the law on STC's for parties relying on international or European law. The referral to domestic decisions may moreover lessen the accessibility of Dutch law for foreign private parties. Moreover, it has become apparent that some courts do not have a clear overview of overlapping sources, which may decrease the accessibility of the law. The lack of interaction between Dutch courts has led to inconsistencies and unpredictability. Moreover, as some courts do not follow the course of the Hoge Raad, the extent to which the Hoge Raad can provide guidelines, in accordance with its task to preserve legal unity, is limited.

11.3.3.7. Conclusion on the development of Dutch law and international trade

Although the Dutch legislator has recognised the increased importance of the needs and preference of international actors and developed the law accordingly in the recodificaiton of Dutch law, later amendments of the law have not taken into acocunt the needs and preferences of international practice. Accordingly, the Dutch legislator has not sufficiently and consistently interacted with relevant actors in the amendment of the law, nor did regulatory competition prompt the Dutch legislator to exercise more restraint in amending the law. Possibly, the Dutch legislator assumed that because of the thorough drafting process of articles 6:231 et seq BW and the general success of the BW, the law on STC's was successful and did not need to be critically reconsidered. These practices should diminish the attractiveness of Dutch law in international trade, despite the Dutch legislator's support of regulatory competition.

The approach of the courts further undermines the attractiveness of Dutch law in international trade. Although the courts adopt less restraint than German courts in international, foreign and European materials, including soft laws, this has not been done consistently. Rather, inconsistent and unpredictable case law has developed. If courts interpret clauses in accordance with Dutch case law, moreover, this may undermine the accessibility of the law for foreign parties. The risks of extensively referring to possible sources also becomes apparent as courts lose the overview and come to incorrect decisions. Moreover, Dutch courts have not sought to compensate for shortcomings visible in Dutch law and lacunae have developed as a result.

Thus, even though Dutch courts generally interact more with international, foreign and European state and non-state actors, which generally should benefit the responsiveness of international and national regimes to trade, this does not make The Netherlands a more attractive forum to international actors.

11.3.5. Conclusion on the development of the law on STC's through the BW

In the development of the law on STC's through the BW, the Dutch legislator has at first sight recognised interdependence in ensuring that the law develops predictably, accessibly, consistently, and responsively. The Dutch legislator has recognised the added value of regulatory competition and participated actively in European debate on harmonisation measures. Notably, in the European debate, the Dutch legislator also adopts a less narrow view than German actors, which should be beneficial for debate. The question however arises whether the Dutch legislator is sufficiently aware of the consequences of particular

suggestions for the predictable, consistent, accessible and responsive development of national private law. Moreover, the active approach is undermined by the lack of participation of relevant Dutch actors in debate.

However, a closer look reveals that the quality of the law on STC's could be improved, but it has been undermined by the lack of consistent and sufficient interaction with European, international, foreign and national state and non-state actors. Consequently, the law has had to be repeatedly amended, and has moreover been amended further, which does not benefit the predictability and accessibility of the law.

Courts do not remedy these shortcomigns by actively participating in European debate or in providing rules where the legislator has left gaps. Instead, the courts follow the restraint of the Dutch legislator in implementing the law. In international cases, this restraint is less visible, but no consistent and predictable approach to the use of foreign, European and international materials is visible.

Moreover, courts have not interpreted clauses more strictly in domestic cases, which is contrary to the Dutch legislator's intention in stimulating regulatory compeition. The inconsistent and unpredictable interpretation of clauses in international contracts has undermined the efforts of the Dutch legislator to make Dutch law and attractive regime in international trade. The extent to which the Hoge Raad can improve this practice is limited as lower courts do not sufficiently take into acocunt the decisions of the Hoge Raad and other lower courts.

11.4. Blanket clauses

This paragraph will consider whether actors have recognised interdependence and interacted accordingly, and if so, how this has affected the extent to which blanket clauses – article 3 Directive 93/13, article 6:233 sub a BW and article 6:248 BW[1911] – contibute to the predictability, consistency, accessibility and responsiveness of the law on STC's.

Paragraph 11.4.1. will turn to the development of the law through article 6:233 sub a BW and paragraph 11.4.2. will discuss model lists. Paragraph 11.4.3. will turn to the evaluation of clauses under in international cases. Paragraph 11.4.4. will end with a conclusion.

11.4.1. The development of the law through article 6:233 sub a BW

Have actors recognised that other actors may also develop the law through blanket clauses, and interacted with these actors accordingly? How has that affected the extent to which article 6:233 sub a BW may contribute to the predictability, accessibility, consistency and responsiveness of the law on STC's?

Paragraph 11.4.1.1. will discuss the drafting of article 6:233 sub a BW and paragraph 11.4.1.2. will consider the interpretation of this provision by the courts. Paragraph 11.4.1.3. will end with a conclusion.

11.4.1.1. The drafting of article 6:233 sub a BW

The Dutch legislator has taken into account especially German experiences with the law on STC's, which increased the chance that Dutch law would function well in practice, considering the success of the AGBG.

The introduction of article 6:233 BW follows the recommendation of the CCA,[1912] inspired by the AGBG, to introduce a blanket clause that could be used for the evaluation of diverging STC's throughout different branches, in individual relations that may differ considerably from one another, and different which allows the law on STC's to be developed through case law.[1913] The CCA advice was approved by the preliminary report of Prof. Hondius,[1914] who, after comparing the various methods that had been developed in other legal orders to control the use of STC's, argued for the use of a blanket clause, in combination with a model list, referring to the AGBG. Parliament considered the creation of a new regime desirable. Although it was held that German law had largely developed on the basis of article 242 BGB, and later article 9 AGBG, the Dutch judiciary showed more restraint in developing the law, and a new regime would also contribute to predictability.[1915] Interestingly, Hartkamp[1916] notes that initially the courts did not take an active approach to the interpretation of articles 6:231 et seq BW; this developed after CJEU case law on the Directive.

The legislator[1917] has explicitly referred to the relation between articles 6:233 and 6:248 BW, noting that the avoidability in article 6:233 BW concerns clauses that diverge from

[1911] HR 14 June 2002, *NJ* 2003, 112 decided that article 6:233 BW does not exclude the simultaneous applicability of article 6:248 BW.
[1912] CCA 1978, p. 21, 32-35.
[1913] Parl GS (Inv 3, 5, and 6), p. 1457.
[1914] E.H. Hondius, p. 150, 169-171.
[1915] Parl GS (Inv 3, 5, and 6), p. 1586-1587.
[1916] A.S. Hartkamp, 'Het nieuwe BW – ontwikkelingen sinds 1992', *AA* 2012, p. 53.
[1917] Parl GS (Inv 3, 5, and 6), p. 1579-1580.

the consequences that the contract of parties would have had, in accordance with article 6:248 BW that stipulates that contracts do not only have the consequences which parties have contracted for, but also consequences following from the law – especially default law, which according to the legislator 'strives for justice rather than predictability' – customs and good faith. The legislator[1918] later abandoned including the comparison with default law in article 6:233 sub a BW. It was held that this perspective would overlook the possibilty that good faith stood in the way of invoking a rule from default law. Consequently, this comparison plays no role in practice.[1919] The question arises whether the CJEU decision in Aziz v Catalunyacaixa[1920] will prompt national judges to reconsider the relevance of default law in their assessments – possibly, courts may be less inclined to refer to this part of parliamentary history.

Notwithstanding the inspiration from the successful AGBG, the introduction of numerous blanket clauses in the BW has also been subject to criticism. The introduction of article 6:233 BW did not codify case law – to the contrary, an argument against the use of a blanket clause was the case law of the Hoge Raad that was considered to prevent it from developing the law in this area.[1921] It was also noted that case law in this area on the basis of good faith had little value as precedent as decisions on this basis differed depending on the circumstances of the contract, whilst the motivation to challenge STC's before the court was limited.[1922] Simultaneously, it was asked whether the inclusion of blanket clauses would effectively provide consumers with more protection.[1923]

If the legislator has taken other legal orders as inspiration in the drafting of article 6:233 BW, this was not made explicit. However, the legislator[1924] has indicated that the resolution adopted by the Council of Europe was taken into account, which in turn was preceded by the 1984 consultation that discussed various means to control the use of STC's, including the use of blanket clauses.

Thus, in the drafting of article 6:233 sub a BW, the legislator was able to benefit from the insight of extensive comparative law research and particularly referred to the successful AGBG.

11.4.1.2. Interaction between the judiciary in the interpretation of article 6:233 sub a BW

The Hoge Raad has not developed a consistent approach to the Directive but it has generally exercised restraint in referring to the Directive and the CJEU and has sought to decide cases in accordance with national law. This restraint is not directly detrimental to private parties, but as it is difficult to reconcile with European decisions, the extent to which these Hoge Raad decisions provide guidance to lower courts is limited.

- Initially, the Hoge Raad decided cases in accordance with Directive 93/13, although it exercised restraint in referring questions to the CJEU.

[1918] Parl GS (Inv 3, 5, and 6), p. 1599.
[1919] C.M.D.S. Pavillon, *Open normen in het Europees consumentenrecht*, Kluwer: Deventer 2011, p. 85.
[1920] CJEU 14 March 2013 (Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)), C-415/11, [2013] ECR, p. I-0. See previously on this decision par. 10.5.
[1921] Parl GS (Inv 3, 5, and 6), p. 1497, referring to nj 1982, 517
[1922] Parl GS (Inv 3, 5, and 6), p. 1460.
[1923] Parl GS (Inv 3, 5, and 6), p. 1498.
[1924] Parl GS (Inv 3, 5, and 6), p. 1455.

The Hoge Raad held, in accordance with the aim of Directive 93/13 to increase consumer protection, that the main terms of the contracts should be interpreted in a limited manner.[1925] As it concerns a term used in the Directive, however, the question arises whether this term should be interpreted autonomously.

- Since this decision, however, the Hoge Raad has adopted restraint in referring cases to the CJEU.

In a decision[1926] on an exclusion clause for personal injuries of the consumer, the consumer had invoked the avoidability of this clause under article 6:233 BW. However, he had only done so after the statement of grounds of appeal ('*memorie van grieven*'), without making clear that he had already invoked the avoidability of this clause in an earlier letter. The Hoge Raad held that although the claimant was allowed to widen the scope of his complaint in appeal, he needed to do before the statement of appeal, in order to concentrate the dispute in appeal. Consequently, invoking the avoidability of the clause went beyond the limits of the dispute ('*grenzen van de rechtsstrijd*'). Invoking article 6:233 sub a BW constituted a new ground of appeal that was not allowed in this stage of the dispute as the counterparty needs to be able to assess against which claims he should defend himself.

Reading this decision may give one the impression that neither the Hoge Raad nor the A.-G. is aware of the existence of the Directive, or the obligation of the judiciary to assess the unfairness of clauses *ex officio* as established by the CJEU.

This is particularly apparent from the CJEU decision in *Banif Plus Bank v Csipai*,[1927] where the CJEU held that the court is bound to assess of its own motion, on the basis of facts and law at its disposal, or the facts that were available to the court as answers to the enquiries of the court raised of its own motion. If the court subsequently finds that a term is unfair, it needs to enable parties to react to this decision.[1928] However, the active role of the courts does not mean that parties invoking the unfairness of a clause do not need to prove why this clause is unfair, unless the clause falls under articles 6:236 and 237 BW, which was the case.

A later decision of the CJEU is even more difficult to reconcile with the Hoge Raad decision. Thus, the CJEU[1929] evauated whether national law limiting parties' possibility to argue on the basis of new facts relevant for the fairness of a clause severely hindered the application of Union law or rendered it impossible, considering the obligation of the court to assess this question of its own motion.

Arguably, if the Hoge Raad did not consider it self-evident whether civil procedure law would allow for the *ex officio* evaluation of the clause, and the CJEU decision in Van Schijndel[1930] may support this conclusion. However, the answer to this question is not easy to deduce from CJEU case law and should therefore not be considered as an *acte éclairé*,[1931] and the later decision of the CJEU[1932] indicates a radically different approach that is contrary to the decision of the Hoge Raad. Therefore, this question should have been referred to the CJEU.

[1925] HR 19 September 1997, *NJ* 1998, 6.
[1926] HR 22 June 2007, *NJ* 2007, 344. Comp. also the decision in Hof Amsterdam 24 January 2012, *RF* 2012, 42, in which the avoidability of a clause (in a contract with a CEO acting as a consumer) that had been invoked in first instance is not assessed.
[1927] CJEU 21 February 2013 (Banif Plus Bank v Csipai), C-472/11, [2013] ECR, p. I-0.
[1928] A.G.F. Ancery, *Ambtshalve toepassing van EU-recht*, Kluwer: Deventer 2012,p. 199-200 points out that courts are only bound to do so if parties, without such interference, are not able to invoke rights derived from European law, which is generally considered to be the case in cases falling within the scope of Directive 93/13.
[1929] CJEU 30 May 2013 (Aegon Magyarország Hitel Zrt v Jörös), C-397/11, [2013] ECR, p. I-0.
[1930] CJEU 14 December 1995 (Van Schijndel), Joined cases C-430/93 and C-431/93, [1995] ECR, p. I-4705.
[1931] See previously par. 10.4.1.1.
[1932] CJEU 30 May 2013 (Aegon Magyarország Hitel Zrt v Jörös), C-397/11, [2013] ECR, p. I-0.

- In subsequent decisions, the Hoge Raad also exercised restraint and emphasised national legislative history rather than the Directive.

In a 2010 decision on an exclusion clause in a contract between an insurer and the insured, who had raped his wife. The insured subsequently claimed payment for damages inflicted by rape. The Hoge Raad[1933] maintained that European law – in this case competition law – does not oblige the judge to evaluate clauses of its own motion. Moreover, A.-G. Rank-Berenschot, whose conclusion was followed by the Hoge Raad, held that the clause is exempt from evaluation as it concerns one of the main terms of the contract. Rather than referring to the Directive, the A.G. considered the *travaux préparatoires* to the BW that defend a less strict regime for insurance contracts, as decisive. Possibly, the restraint of the Hoge Raad in the *ex officio* interpretation of an exclusion clause may be traced to questions regarding the limits of the judiciary to evaluate a clause *ex officio*.[1934]

In a 2012 decision, the Hoge Raad[1935] considered that the court of appeal had incorrectly evaluated the fairness of an arbitration clause by an abstract standard, insufficiently considering the individual circumstances of the case. Therefore, its decision implied that arbitration clauses should be generally be considered unfair in consumer contracts, which need not be the case as the clause did not fall within the scope of articles 6:236 and 237 BW. This is a convincing motivation, in line with the Directive, but the subsequent considerations of the Hoge Raad are more problematic.

Referring to *Freiburger Kommunalbauten*, [1936] the Hoge Raad holds that the CJEU has left the assessment of the fairness of clauses to national courts. Interestingly, however, the Hoge Raad does not refer to subsequent CJEU case law, which may be especially problematic if the conclusion that the CJEU has started to provide guidelines for the interpretation of national law implementing the Directive, is correct. [1937]

►Thus, the decisions from the Hoge Raad do not show a consistent approach to the Directive, although restraint has generally been visible. Generally, not referring to the CJEU need not mean that cases are decided contrary to the Directive and it may not directly be problematic for private parties, especially not as the restraint in *ex officio* evaluation of clauses benefits the predictability of the law. Moreover, decisions in line with national law are advantageous for consistency. However, the decisions of the Hoge Raad seem difficult to reconcile with CJEU case law, and lower courts difffer, which has led to inconsistencies.

- Notably, some lower courts have decided in accordance with surrounding national law and decisions from the Hoge Raad.

The cantonial court Venlo,[1938] in a clause for termination because of criminal offenses in a contract for accommodation, also did not refer to the Directive but rather article 7:213 BW which stipulates that tenants should behave in accordance with good faith, as well as a decision from the Hoge Raad.

The district court 's-Gravenhage,[1939] deciding on a case in which a jurisdiction clause for the cantonial sector was included in the STC's, did not refer to CJEU case law, but rather to national mandatory civil procedure law (article 96 Rv) that held such a clause for invalid.

[1933] HR 23 April 2010, *NJ* 2010, 454, see the conclusion of the A.G. under par. 3.20-3.21.
[1934] C.M.D.S. Pavillon, 'De wisselende betekenis van de Richtlijn oneerlijke bedingen in de Nederlandse rechtspraak: een overzicht', *VrA* 2006, p. 43.
[1935] HR 21 September 2012, *RvdW* 2012, 1132. See further on the *ex officio* application of European law A.G.F. Ancéry, *Ambtshalve toepassing van EU recht*, Kluwer: Deventer 2012.
[1936] CJEU 1 April 2004 (Freiburger Kommunalbauten v Hofstetter), C- 237/02, [2004], ECR, p. I-3403.
[1937] CJEU 26 April 2012 (Hatóság/Invitel), C-472/10, ECR [2012], p. I-0, par. 22, similarly CJEU 9 November 2010, (VB Pénzügyi Lízing/ Schneider), C-137/08 , [2010] ECR p. I-0, par. 44, CJEU 15 March 2012 (Pereničová and Perenič/SOS financ spol. s r.o.), C-453/10, [2012] ECR, p. I-0, par. 43, CJEU 16 November 2010 (Pohotovosť s.r.o./Korčkovská), C-76/10, [2010] ECR, p. I-0, par. 58, 60, as discussed previously in chapter 10.
[1938] Ktr. Venlo 1 July 2009, *WR* 2010, 17.
[1939] Rb. 's-Gravenhage 11 February 2009, *Prg*. 2009, 155.

The cantonial court Assen[1940] held a clause between a consumer and her lawyer which resulted in an increase of costs for the consumer, ineffective, and referred to the guidelines establish by the Dutch Bar that prescribe that lawyers discuss the possibility that costs are raised with a consumer.

The cantonial court Rotterdam held that a provider of electricity could not effectively invoke the clause that excluded liability for malfunctions, except for damages caused with intent or by considerable negligence, held that the clause was ineffective as the provider had not made the facts of the case available in such a way that the consumer was able to defend that intent or negligence caused the defect, referring to article 6:75 Rv. The decision is also in line with article 21 Rv that obliges parties to bring forward all facts that are relevant for the decision, which the provider in the opinion of the court had not done. The court does not refer to a previous decision from the Hoge Raad.[1941]

The court of appeal 's-Hertogenbosch[1942] held that a clause that held the consumer who had rented a trailer liable in cases of loss or theft, contrary to societal views on justice, as established by the Hoge Raad,[1943] and considered whether clauses that diverged from this view were nevertheless an established practice. The court was not convinced by the other sets of STC's that the lettor had provided and moreover considered that the consumer was not able to insure himself against damages arising from loss or theft of a rented trailer. For these reasons, the court held the clause was ineffective.

The cantonial court The Hague[1944] held that the user of a similar clause was not unfair, considering that this clause was included in STC's that had been negotiated collectively between consumers' organisations and electricity providers.

►In these decisions, the minimum character of Directive 93/13 and the shape of the measure allow courts to decide in accordance with national law and practice, which benefits the consistent and responsive development of the law on STC's.

- Some decisions are moreover in accordance with surrounding Directives.

The district court Utrecht,[1945] in a case in which a health insurer sought to amend its policy on the basis of a clause that allowed it to amend its STC's, did not assess the fairness of this term. Instead, the court judged that the way in which the insurer exercised its right to amend its STC's was contrary to good faith under articles 6:2 and 6:248 BW, which falls outside the scope of the Directive. However, the insurer, by amending its clauses may have acted contrary to Directive 2005/29 on unfair commercial practices – which had not yet entered into effect at the time of the decision – as well as misleading advertising, as it had used its wide policy specifically to attract new consumers.

Another decision of the decision of the cantonial court Utrecht[1946] showed similar overlap. The court held a contract that did not provide the consumer with a possibility to cancel the contract unfair, which was especially problematic as the consumer concluded the contract in the studio of the offeror and signed the contract without adequately considering the costs and benefits of the contract, because she was overwhelmed by the provider who had promised a free and noncommittal intake interview. This situation seems to fall under Directive 85/577 on doorstep selling. The decision of the court under article 6:233 sub a BW seems surprising as the main complaint seems to be that the

[1940] Ktr. Assen 11 September 2007, *Prg*. 2008, 3.
[1941] HR 16 May 1997, *NJ* 2000, 1.
[1942] Hof 's-Hertogenbosch 9 January 2007, *LJN* AZ5893, followed by Ktr. Sneek 9 May 2012, *Prg*. 2012, 218.
[1943] HR 24 October 1997, *NJ* 1998, 69, comp. the conclusion of A.-G. Vranken under par. 15-16.
[1944] Ktr. 's-Gravenhage 5 August 2008, *NJF* 2009, 460. Some decisions in accordance with nat practice may however be more problematic, for example the decision of the Board of 29 September 2009, nr 31530, at http://www.degeschillencommissie.nl/klacht-indienen/eerdere-uitspraken/31530/afwezigheid-van-7-maanden that invoking article 6:233 sub a BW is not possible as it concerns STC's that have been negotiated with the Dutch consumers' organisation.
[1945] Rb. Utrecht 8 June 2007, *NJF* 2007, 359. Comp. also Ktr. Rotterdam 17 July 2008, *Prg*. 2008, 184, stating that good faith stands in the way of invoking the STC's against the consumer, considering the small breach of the consumer.
[1946] Ktr. Utrecht 5 July 2006, *Prg*. 143.

provider did not include a term that allowed the consumer to cancel the contract, which is a requirement for the applicability of article 6:233 BW. The decision does not refer to either Directive or CJEU case law.

►These decisions demonstrate that decisions in accordance with the *acquis* may also be in accordance with national legal views on justice, as reflected in articles 6:2 and 248 BW as well as national law.

- Problems however become apparent in other decisions where the decisions of the Hoge Raad are difficult to reconcile with CJEU decisions. Some courts have expressly followed the Hoge Raad.

Accordingly, the court of appeal Amsterdam[1947] upheld a clause in an insurance contract that limited the coverage in case the consumer terminated the contract, holding that this term fell under the main terms of an insurance contract. Although the court does not directly refer to the Directive itself, it does refer extensively to legislative history as well as a previous decision from the Hoge Raad,[1948] which Hartkamp[1949] characterises as an example of indirect effect, to determine the meaning of 'main terms of the contract' in the meaning of article 6:231 BW. The court however does not refer to the Directive itself.

In another case, concerning a consumer in Germany and an insurer, the court of appeal 's-Hertogenbosch[1950] held that a clause limiting the coverage of the policy was a main term, exempt from judicial evaluation, and referred to previous decisions from the Hoge Raad that however did not fall within the scope of the Directive. However, the decision is also in line with the 2010 decision of the Hoge Raad on an exclusion clause.

- However, other, previous decisions contradict these decisions, which leads to inconsistency and unpredictability.

Interestingly, the court of appeal 's-Hertogenbosch[1951] did not similarly hold that a term on the coverage of an insurance policy was a main term of the contract. The court held instead that even if the clause in the insurance contract with the consumer was a main term, it was irreconcilable with standards of fairness, and the clause should therefore not be upheld.

- Decisions on other issues similarly show inconsistencies. Thus, some lower courts, in line with the Hoge Raad, have refused to evaluate clauses *ex officio*.

Thus, the court of appeal Arnhem[1952] assessed of its own motion a clause that stipulated that in the case of cancellation, the consumer was obliged to pay 30% of the price, or, in cases that the consumer is aware that the contract can be performed, 50 % of the price. The court of appeal referred to CJEU case law and stated that it would assess the terms of its own motion as the consumer was unable to pay for legal advice. It may however be doubted whether courts may only assess clauses of their own motion when consumers are not able to substantiate why a clause is unfair.

This view was however subsequently adopted by the district court Haarlem[1953] that refused to assess terms of its motion as the consumer had invoked the unfairness of the clause while it was not established that the consumer was unable to pay for legal advice.

[1947] Hof Amsterdam 30 September 2008, *LJN* BG2107.
[1948] HR 19 September 1997, *NJ* 1998, 6.
[1949] Asser/Hartkamp (2011), nr 186.
[1950] Hof 's-Hertogenbosch 22 March 2011, *LJN* BP9625.
[1951] Hof 's-Hertogenbosch 26 May 2009, *NJF* 2009, 336.
[1952] Hof Arnhem 5 June 2001, *NJ* 2001, 622.
[1953] Ktr. Haarlem 22 January 2003, *Prg*. 2003, 6031,

Similarly, the district court Utrecht,[1954] referring to CJEU case law, refused to assess a term of its own motion, holding that the claimant – a consumer organisation – was aware of the protection conferred upon consumer, as its request to the court to apply article 6:236 of its own motion showed, while the consumer organisation was not a weak party in need of protection. The court moreover found that the organisation had not sufficiently established that the disputed clause fell within the scope of article 6:236 BW. This reasoning seems contrary to the idea of applying the provisions of its own motion. The ability of the judge to do so can however be limited if the judge has insufficient information on the clause, but it does not become apparent whether the judge has allowed the organisation sufficient opportunity to establish that the clause fell under article 6:236 BW. The decision moreover does not seem to be in line with the reasoning of the legislator when this article was established. Notably, the black list under article 6:236 BW was drafted narrowly to facilitate the predictable interpretation of article 6:233 BW.

- Other courts have however decided differently and evaluated clauses of their own motion.

The cantonial court Eindhoven[1955] that held a clause in a contract between a consumer and a library, insofar as it aimed to exclude the duty of the library to mitigate its own damages, ineffective of its own motion, referring to CJEU case law.[1956]

The cantonial court Assen,[1957] after referring to CJEU decisions in Océano[1958] and Mostazo Claro,[1959] allowed parties to argue whether the clauses in a consumer contract were unfair or not. The court subsequently decided that the penalty clause was unfair as there was no limit to the penalty. Similarly, the cantonial court Breda,[1960] also referring to the CJEU decision in Pannon,[1961] raised the fairness of clauses of its own motion and rejected the claim for compensation as based on these clauses.

After the 2012 decision of the Hoge Raad, these decisions are still visible. Accordingly, the cantonial court Rotterdam [1962] held that it was bound to raise the fairness of STC's of its own motion, in accordance with CJEU case law, and held a penalty clause could not be held partially ineffective under article 3:41 BW, as became apparent from the CJEU decision in Banco Español de Crédito v Calderón Camino.[1963]

Moreover, The Netherlands has a well-established system of ADR by the *Geschillencommissie* (hereafter: the Board[1964]) that has resolved disputes in a large amount of cases.[1965] The alternative character of dispute resolution by the Board entails a more active approach,[1966] which may mitigate possible problems with regard to the duties of courts to evaluate unfair clauses *ex officio*. The active approach of the Board however depends on the code of the different committees. Accordingly, in some cases, the approach of the Board seems more in accordance with the Directive than the approach of some courts. In a case where a seller invoked the disclaimer on his webpage, the Board[1967] held that this fell under article 6:236 and was ineffective.

[1954] Rb. Utrecht 4 January 2006, *NJF* 2006, 152.
[1955] Ktr. Eindhoven 22 My 2008, *Prg*. 2008, 151.
[1956] Comp. also Ktr. Rotterdam 4 May 2012, *NJF* 2012, 398 while upholding a clause that enabled the provider to suspend its obligations, held that invoking the clause was unreasonable under article 6:248 BW, stating that the provider would otherwise circumvent consumer protection standards described in a report on the ex officio application of European consumer law.
[1957] Ktr. Assen 14 February 2008, LJN BC4373.
[1958] CJEU 27 June 2000 (Océano), joined cases C-240/98 to C-244/98, [2000], ECR, p. I-4941.
[1959] CJEU 26 October 2006 (Mostaza Claro), C-168/05, [2006] ECR, p. I-10421.
[1960] Ktr. Breda 3 February 2010, *LJN* BL2804
[1961] CJEU 4 June 2009 (Pannon), C-243/08, [2009] ECR, p. I4713.
[1962] Ktr. Rotterdam 5 October 2012, *LJN* BY5236.
[1963] CJEU 14 June 2012 (Banco Español de Crédito SA v Joaquín Calderón Camino), C-168/10, [2012] ECR, p. I-0.
[1964] The decisions of the different committees are hereafter indicated as decisions from the Board.
[1965] Although parties are not provided with an enforceable title in ADR cases, both consumers and businesses have however indicated that compliance with binding advice is generally high, see A. Klapwijk, M. ter Voert, *Evaluatie De geschillencommissie 2009*, available at www.wodc.nl.
[1966] HR 17 November 1995, *NJ* 1996, 143.
[1967] Decision of 2 March 2009, nr 33773, at http://www.degeschillencommissie.nl/klacht-indienen/eerdere-uitspraken/33773/disclaimer-is-onredelijk-bezwarend-beding-in-de.

Interestingly, the consumer appears not to have invoked the avoidability of the clause in so many words. The Board apparently did not consider this an obstacle. However, the reasoning of the Board in this case may be problematic, as the Board incorrectly held that the disclaimer did not fall under the definition of STC's in article 6:231 sub a BW, but it similarly held that article 6:236 applied by analogy.

- The lack of guidance of the Hoge Raad is also visible in the referral of questions to the CJEU by lower courts, notwithstanding case law from the Hoge Raad.

Thus, the court of appeal Arnhem[1968] has referred questions to the CJEU whether Directive 99/44 obliges the court to examine the capacity of the buyer of it own motion, in particular whether the buyer is a consumer in the sense of the Directive.

►Possibly, decicions from the courts may be undermined if decisions of the Hoge Raad are later considered incorrect, and the chance that the CJEU will decide a case in such a way that forces the Hoge Raad to alter its approach increases as lower courts, rather than referring to the Hoge Raad, directly refer cases to the CJEU.

- In other cases, the question whether the decision is line with the Directive despite referral to the Directive remains open.

For example, the decision of the court of appeal Amsterdam,[1969] which upheld clauses in a contract of settlement that limited the legal rights of claimants on the basis of previous contracts on contracts on the lease of securities, were held to constitute the main terms of the contract. The court referred to the Directive, stating that the Directive did not justify a different conclusion. Arguably, considering the nature of the contract, and the circumstance that the offer constituted an improvement to the consumers' rights under the contract, it can be doubted whether this decision is contrary to the Directive. This would be especially true if the consumers had entered into the contract after legal advice. It may also be argued that a different conclusion would limit the predictability that parties pursue by entering into a settlement contract. Nevertheless, it would have been interesting to see how the question whether clauses included on the black list of the annex to the Directive or national lists, may constitute the main terms of the contract[1970] – which will often be contrary to mandatory law – and if this is the case, whether they are exempt from control if they are the main terms of the contract, would have been answered by the CJEU.

►Thus, the restraint of the Hoge Raad and lower courts in referring questions to the CJEU may at first sight not be problematic for private parties, especially not if it benefits the consistent and predictable development of the law.

11.4.1.3. Conclusion on the development of the law through article 6:233 sub a BW

Interdependence becomes visible as the role of the Hoge Raad is undermined in cases where contradictory CJEU decisions are available that have moreover played a role in activating national courts. The lack of interaction between lower courts has also led to inconsistent and unpredictable decisions, which is likely also not in accordance with the needs and preference of businesses or legal views on justice.

[1968] Hof Arnhem 9 April 2013, *LJN* BZ6346.
[1969] Hof Amsterdam 14 October 2008, *NJF* 2008, 481.
[1970] This is doubted in the conclusion of A.-G. Hartkamp before HR 16 May 1997, *NJ* 2000, 1.

In the long term, the restraint of lower courts and the Hoge Raad may also entail that relevant questions are not considered in the reform of Directive 93/13. Thus, in the future reform of Directive 93/13, no questions on the *ex offico* obligations of courts, the avoidability of STC's, the CJEU decision in Van Schijndel and national civil procedure law would be raised and problems would likely persist at the national level.

11.4.2. Model lists

Have actors, in the development of model lists, recognised interdependence and interacted accordingly, and how has that affected the predictability, consistency, accessibility and the responsiveness of the law?

Paragraph 11.4.2.1. will turn to the development of articles 6:236 and 237 BW and paragraph 11.4.2.2. will turn to the interpretation of these provisions. Paragraph 11.4.2.3. will end with a conclusion.

11.4.2.1. The drafting of model lists

Dutch actors, in the drafting of articles 6:236 and 237 BW, have benefitted from the insights of comparative law, but exercised restraint in amending the law to implement Directive 93/13, which has benefitted consistency and predictability.

Hartkamp[1971] notes that the inclusion of articles 6:237 and 238 BW was based on comparative law, in particular the 1979 preliminary report on STC's. The legislator[1972] noted that model lists had different functions in different legal orders – while in some orders, model lists aim to restrict the use of clauses that are considered particularly undesirable, model clauses in other legal orders seemed to provide guidance for the interpretation of corresponding blanket clauses. The legislator preferred the latter approach.

The Dutch legislator [1973] in particular held that it wanted to mitigate potential unpredictability that could arise from the introduction of the judicial evaluation of STC's, while also alleviating the workload of the judiciary that was bound to increase given the use of blanket clauses in the BW. Parliamentary history[1974] further makes clear that the list is oriented on national case law, practice and literature. The Dutch legislator,[1975] referring to German and Austrian law, did not think that limiting the applicability of articles 6:236 and 237 BW would lead to unpredictability. Notably, the legislator also argued that it was important that the lists would not petrify legal practice.[1976]

After the implementation of the Directive, the legislator has maintained the lists in article 6:236 and 237 BW. The restraint of the Dutch legislator may have been motivated by the extent to which the Dutch model lists could support predictability and consistency. Jongeneel[1977] has objected to amending the model lists in accordance with the EU list as this may stand in the way of the development of legal practice on these lists. Possibly, amending articles 6:236 and 237 BW would have undermined the aim of these provisions, to add to the predictable and consistent interpretation of article 6:233 BW. Also, revising the list may have been problematic as this could have entailed revising corresponding default rules in the BW

[1971] Asser/Hartkamp/Sieburgh (2010) nr 492.
[1972] Parl GS (Inv 3, 5, and 6), p. 1648-1649.
[1973] Parl GS (Inv 3, 5, and 6), p. 1651.
[1974] Parl GS (Inv 3, 5, and 6), p. 1686 et seq.
[1975] Parl GS (Inv 3, 5, and 6), p. 1656.
[1976] Parl GS (Inv 3, 5, and 6), p. 1488.
[1977] Jongeneel *TvC* 1993, p. 125

that was still to be introduced. Nevertheless, Jongeneel recognises the possibility that national lists are to be amended.

An additional reason for the restraint of the Dutch legislator may have been the lack of clarity on the question whether the list, which is after all non-binding, should be implemented.[1978] Van Erp[1979] states that he has no idea what the 'indicative list' means, and points to the need for clarification by the CJEU. The CJEU has accordingly referred to the annex of the Directive in the interpretation of article 3, and ruled, in Sweden/Commission, [1980] that a Member State did not have to include the model list in legislation, as long as the list is sufficiently available for consumers as a source of information.

Thus, in the drafting of articles 6:236 and 237 BW, the Dutch legislator was inspired by comparative law that enabled it to benefit from experiences and insights from other legal orders. However, the Dutch legislator did not amend these lists in accordance with model list in the Annex to Directive 93/13. This may have undermined accessibility, but it preserved predictability and consistency.

However, if the 1993 Directive is reformed and the European model list becomes binding, this may severely undermine the aim of the Dutch model lists, which has not been considered, as such, by the Dutch legislator, that did not oppose a binding model list as such.[1981]

11.4.2.2. The interpretation of articles 6:236 and 237 BW

Dutch courts have exercised restraint in referring cases to the CJEU and other Dutch courts in the evaluation of clauses falling under articles 6:236 and 237 BW, which has undermined consistency and predictability. Moreover, the restraint has decreased the chance thta in the reform of Directive 93/3, questions that have become apparent in cases are not considered, which inhibits the responsive development of the Directive.

- The Hoge Raad has generally considered the status of the model list in the Annex to Directive 93/13.

The Hoge Raad,[1982] notes that the inclusion of a clause in this list is an indication that a clause may be unfair. Whether the clause is unfair depends upon the circumstances of the case.

The Hoge Raad follows the conclusion of A.-G. Wesselink-Van Gent, who refers expressly to the Directive. The A.G. takes the indirect effect as a starting point to determine to what extent the model list is relevant to the assessment of the fairness of clauses and expressly refers to Commission/Sweden, arguing that this decision justifies the conclusion that the inclusion of a clause in the European list is a point of view, and not decisive.

Thus, the European list stays behind article 6:236 and 237 BW: if a clause falls under the Dutch gray list, the user of this clause has to prove that considering the circumstances of the case, the clause is not unfair. Specifically, if a clause falls under the Annex to the Directive, but not the Dutch black or grey list, the consumer still has to prove that a clause is unfair. At most, the judge will have to

[1978] Comp. for example J. Hijma, 'Richtlijn 93/13/EEG betreffende oneerlijke bedingen in consumentenovereenkomsten', in: S.C.J.J. Kortmann et al. (eds.), *Onderneming en 5 jaar nieuw burgerlijk recht*, Tjeenk Willink: Deventer 1997, p. 424 finds that the model list does not oblige Member States or judges to implement it, although he considers that the judiciary might refer to the list and in this way give weight to the list.
[1979] J.H.M. van Erp, 'Van onredelijk bezwarend naar oneerlijk, of: van Nederzwart en Nedergrijs naar Euroblauw', *WPNR* 6079 (1993), p. 82.
[1980] CJEU 7 May 2002 (Commission/Sweden), C-478/99, [2002] ECR p. I-4147, par. 22.
[1981] See the Dutch response to the Green Paper on the review of the consumer acquis, available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/responses/ms_netherlands.pdf, par. 4.5.
[1982] HR 24 March 2006, *NJ* 2007, 115, see the conclusion of A.G. Wesseling-van Gent pars. 2.50-2.53, comp. also HR 17 December 2004, *NJ* 2005, 271.

allow the consumer to prove that the clause if unfair under article 6:233 sub a BW,[1983] and the circumstance that the clause is included in the Annex to the Directive is merely one viewpoint among several relevant points of view.

Referring this case to the CJEU would have provided more insight in the status of the European model lists, which in turn could have provided more insight in the approach that judges – and possibly, legislators – have to adopt towards this list, in particular whether the judiciary has to assess of its own motion whether a clause falling under the Annex is unfair.

This decision does however not mean that courts are obliged to take the European model list into account, which also follows from subsequent decisions from the Hoge Raad[1984] in which it does not pay attention to the European model list as such.

The Hoge Raad has not often referred cases to the CJEU.[1985] That does not mean that these cases have been decided incorrectly. However, arguably, the Hoge Raad's decisions touch upon the interpretation of article 3 Directive 93/13 and may moreover entail that Dutch law goes below the level of protection established by the Directive. In addition, the CJEU is competent to establish the allocation of tasks between the CJEU and national courts. Therefore, these questions should have been referred to the CJEU.[1986]

The restraint need not be directly problematic for private parties as the restraint may well may be motivated by the wish to maintain the consistent, predictable and responsive development of the law on STC's. Regrettably, however, the restraint of the Hoge Raad, entails that questions that could be relevant for the reform of Directive 93/13 may not become visible at the European level, which undermines the responsive development of this Directive.

However, notwithstanding this restraint, the Hoge Raad has provided some guidance to lower courts on the status of the European model list. As the decision does not conflict with CJEU decisions, the role of the Hoge Raad should not be undermined, but the decision itself in fact does not oblige courts to take a particular approach, as it merely provides that the indicative list can have such a status; this does not mean that the European model list must be consistently taken into account.

However, in rare cases, the inclusion of a clause under the European model list has prompted courts to presume that clauses are unfair unless the user of that clause can prove otherwise.[1987]

- Some lower courts have followed the decisions from the Hoge Raad.

[1983] Asser/Hartkamp (2011) nr

[1984] HR 16 May 1997, *NJ* 2000, 1 held the users of STC's had not sufficiently established that an exclusion clause, which fell under the grey list in article 6:237 BW, was not unfair. The conclusion of A.-G. Hartkamp that was followed by the Hoge Raad referred to Dutch law and parliamentary history, and to German law. Neither the decision of the Hoge Raad nor the A.-G. refers to Directive 93/13, but that does not mean that the decision, which emphasises the aim of the Dutch regime – that coincides with the European regime – is contrary to the Directive. HR 24 March 2006, *NJ* 2007, 115 decided that the discretion of the judge to mitigate a penalty clause under article 6:94 BW was relevant for assessing whether the penalty clause was unfair. With this decision, the Hoge Raad also diverges from case law in which it has emphasized restraint that should generally be adopted in the mitigation of penalty clauses, see HR 27 April 2007, *NJ* 2007, 262, HR 13 July 2012, *NJ* 2012, 459.
see the conclusion of A.-G. Hartkamp under pars. 10-12

[1985] Comp. B. Wessels, 'Collectief actierecht komt moeizaam tot bloei', *WPNR* 6249 (1996), p. 885, who found that the Hoge Raad might well have referred the decision in HR 16 May 1997, *NJ* 2000, 1. Particularly, a quesiton to the CJEU would provide more insight in relevant circumstances to be taken into account in the evaluaiton of the fairness of clauses.

[1986] See previously par. 10.4.1.1.

[1987] Ktr. Maastricht 16 July 2008, *NJF* 2008, 397 held that a clause that stipulated that the consumer was obliged to pay for the entire subscription period, even though the contract had been terminated, fell under sub e in the list in the Annex to the Directive . Therefore, this clause would be presumed to be unfair, unless the user could prove that the clause was fair. With this decision, the court seems to diverge from the approach from the Hoge Raad, attaching more weight to the Annex, and evaluating the clause of its own motion, without referring whether the clause falls under articles 6:236 or 237 BW.

Accordingly, with regard to a penalty clause in a contract for accommodation, the cantional court Amsterdam[1988] held that he was bound to evaluate this clause under Directive 93/13 and upheld the claim of the user to mitigate the penalty clause to an extent that it would not constitute an unfair term under article 6:233 BW. The judge explicitly referred to the Directive and CJEU case law, but he did not refer to foreign decisions.[1989]

Similarly, the court of appeal Amsterdam[1990] upheld a clause in an accommodation contract that imposed a fine on the tenant in cases of illegal subletting. The court held that damages arising from illegal subletting is difficult to determine, which entails that it will not be evaluated whether the clause obliges the consumer to pay a disproportional amount of damages, as defined in the Annex to the Directive. Moreover, as the clause aims to prevent illegal subletting, it should be sufficiently high to have a preventive effect, which entailed that the mitigation imposed by the cantonial court was reversed.

- Other decisions do not follow the Hoge Raad and inconsistency has developed.

For example, the cantonial court Haarlem[1991] held a penalty clause unfair as the provider of a credit card had not limited the amount of the penalty in the contract. Article 6:94 BW was not invoked. The decision of the court refers to CJEU case law, but not to the decision of the Hoge Raad.

Similarly, the court of appeal 's-Gravenhage[1992] held that a clause obliging the consumer to pay 50% of the invoice by way of compensation for cancellation was unfair. The court considered that the clause was a penalty clause in the sense of article 6:91 BW that was included in the list in the Annex to Directive 93/13, while it was not apparent that the seller had alerted the consumer on the possibility that 50% of the invoice would be charged if the consumer cancelled the contract. Notably, the court does not refer to the previous decision of the Hoge Raad, nor does it follow the approach set out by the Hoge Raad by limiting the amount of the fine to an amount that is considered reasonable under article 6:94 BW.

This line is also visible in ADR decisions. Thus, the Board,[1993] with regard to a clause that fixed the costs of the consumer on 15% of the contract price, did not hold the contract ineffective, but mitigated the clause. This decision is in contrast to previous case law,[1994] although the mitigation of the amount that is to be paid to the consumer may be in accordance with the case law form the Hoge Raad, which may however turn out to be incorrect, depending on the decision of the CJEU on the cases referred to it by the court of appeal Amsterdam.

- Generally, however, a consistent approach does not become visible. Some cases seem particularly problematic.

A particularly problematic decision is the decision of the court of appeal 's-Gravenhage[1995] upheld an exclusion clause that fell under article 6:237 BW, holding that the clause excluding the liability of the landlord for damages arising from a leakage in the flat over the flat of the tenant was a clause that was often used in contracts for accommodation, while tenants could insure themselves against these kinds of damages. Arguably, this evaluation is reminiscent of the evaluation under article 6:233 sub a BW

[1988] Ktr. Amsterdam 15 January 2010, *RVR* 2010, 50.
[1989] Thus, German law would have provided a more critical perspective, as converting an unacceptable clause to an acceptable clause is much more controversial in German law, as this would indirectly 'reward' the use of unfair STC's. See MuchKomm BGB/Basedow (2012), article 306, nr 12, 28.
[1990] Hof Amsterdam 21 February 2012, *BR* 2012, 89.
[1991] Ktr. Haarlem 13 May 2009, *Prg*. 2009, 105.
[1992] Hof 's-Gravenhage 12 February 2008, *NJF* 2008, 158.
[1993] Decision of 2 March 2009, nr 33813, at http://www.degeschillencommissie.nl/klacht-indienen/eerdere-uitspraken/33813/15-annuleringskosten-is-een-eenzijdig-beding-in, comp also the decision of 29 January 2009, nr 33289, at http://www.degeschillencommissie.nl/klacht-indienen/eerdere-uitspraken/33289/annulering-door-consument-wegens-overmacht-niet, also the decision of 24 November 2011 ,nr 34411, at http://www.degeschillencommissie.nl/klacht-indienen/eerdere-uitspraken/34411/annulering-na-aanvang-volledig-kosten.
[1994] Hof Arnhem 1 August 2000, *NJ* 2001, 71.
[1995] Hof 's-Gravenhage 10 September 2004, *Prg*. 2005, 13.

that takes as a starting point the mutual apparent interests of parties at the time of the conclusion of the contract. However, the court explicitly – and incorrectly – holds that this article (which it curiously indicates as article 7A:233 BW) is not yet applicable, even though it considers article 6:237 BW to be applicable. The court subsequently finds that the argument of the landlord that tenants can easily insure themselves against the damage, as well as the fact of 'common knowledge' that tenants frequently insure themselves, sufficiently rebuts the assumption that the clause is unfair. However, a correct evaluation under article 6: 237 sub h BW arguably would have taken the question whether the tenant had in fact insured himself for this damage because he was aware that the landlord had excluded liability in order, for example, to maintain a low rent, as a starting point, which is not the case. Arguably, it can be doubted whether this decision is in accordance with the Directive.

The decision of the district court Almelo[1996] is also problematic in the light of the Directive. The court upheld the declaration that acceptance of this form entailed that the consumer has received the STC's as it constituted a private act ('*onderhandse akte*') in the sense of article 157 Rv. Later decisions have not followed this decision, and characterized similar clauses as clauses falling within the scope of article 6:236 sub k BW that were considered unfair.[1997] With regard to the dissolution clause, according to which the rights of consumer were dissolved unless he brought a complaint within a specific period – which the consumer had not done – the district court Almelo moreover held that the clause was negotiated between travel organisations and a consumers' organisation, while the consumer had insufficiently established that the mutual apparent interests of parties brought about that the clause was unfair. The court does not consider article 6:237 BW, although the clause may well fall within the scope of article 6:237 sub h BW. This oversight is unfortunate, because it overlooks that if the clause would have fallen within the scope of this article, this would have entailed that the travel organisation would have to prove that the clause was fair.

- These decisions are moreover contradicted by other decisions from lower courts

The district court Amsterdam,[1998] referring to CJEU case law, rejected a clause that declared that the consumer had received the STC's of its own motion, holding that the clause fell under article 6:236 sub k BW.

The cantonial court Oud Beijerland[1999] held that a clause that stated that the consumer had received text of clauses did not in fact prove this, in accordance with article 157 Rv, as it concerned a clause that fell under article 6:236 sub k BW. The consumer had challenged the statement of the provider that he had received the STC's, but had not, in so many words, challenged the clause that stipulated that he had received the STC's.

The cantonial court Heerlen[2000] similarly rejected this clause as it concerned a clause that fall under article 6:236 sub k BW. Notably, the consumer in this case had expressly challenged the fairness of this clause.

The district court Utrecht[2001] held a similar declaration invalid on the same grounds.

- Similarly problematic decisions also become visible.

The cantonial court Tiel[2002] upheld a clause automatically renewing a subscription trial. The court decided that article 6:236 sub j BW stipulated that clauses renewing a contract for more than one year were unfair, and article 6:237 sub l BW indicated that clauses stipulating a termination period of more than three months were presumed unfair. As the clause did not have this effect, it was upheld.

[1996] Rb. Almelo 6 September 2006, *NJF* 2006, 536.
[1997] Ktr. Oud Beijerland 17 September 2007, *Prg*. 2008, 4, Ktr. Heerlen 8 October 2008, *NJF* 2009, 9, Rb. Utrecht 2 September 2009, *NJF* 2010, 33.
[1998] Rb. Amsterdam 12 November 2003, *NJ*F 2003, 71.
[1999] Ktr. Oud Beijerland 17 September 2007, *Prg*. 2008, 4.
[2000] Ktr. Heerlen 8 October 2008, *NJF* 2009, 9.
[2001] Rb. Utrecht 2 September 2009, *NJF* 2010, 33.
[2002] Ktr. Tiel 15 June 2005, *Prg*. 2005, 143.

The judge interpreted articles 6:236 and 237 BW a contrario, holding that clauses that do not fall under these articles are not unfair. It can be doubted whether this interpretation is in accordance with article 6:233 sub a BW and the aim of these rules to increase consumer protection.

- This decision is in contrast with other decisions.

Other decisions already held the automatic extension of contracts was unfair under article 6:233 sub a BW pior to the amendment of the law.[2003]

Accordingly, the cantonial court Rotterdam,[2004] expressly referring to the Annex to the Directive, held that a clause automatically extending a test subscription, which had only been used during the first week, was ineffective. Interestingly, the user of STC's indicated that the effects of the clause automatically renewing the contract may have been unfair towards the consumer in this case.

- In other cases, courts apparently do not find sufficient guidance in the decisions from the Hoge Raad.

The court of appeal Amsterdam[2005] recognises that Directive 93/13 may be applicable and accordingly has referred questions to the CJEU. In response to these questions, the CJEU[2006] has held that the landlord in this case fell within the scope of the definition in the Directive that is applicable to contracts between professionals and consumers, The CJEU further emphasised the *ex officio* obligation of courts to assess unfair terms of their own motion and subsequently considered the procedural autonomy of Member States, the principle of equality and the effectiveness of Union law. Particularly, the CJEU decided that the Directive consists of mandatory law, and according to the CJEU, it is of fundamental importance to the improvement of the standard of living within the Union.Consequently, national law implementing the Directive should be considered as rules of public policy. Thus, if national courts are bound to apply provisions of public policy of their own motion, national judges should also apply law implementing the Directive of their own motion. Moreover, Directive 93/13 has not enabled judges to mitigate clauses rather than hold these clauses ineffective.

The decision from the courts of appeal Amsterdam shows considerable similarities with a 2012 decision in which it upheld a penalty clause in a contract for accomodation,[2007] In its 2012 decision, the court of appeal Amsterdam has unfortunately not waited for the response from the CJEU, which arguably increases the chance that the decisions are not consistent with the answers provided by the CJEU.

►The lack of guidance of the Hoge Raad on this point has enabled courts to develop diverging approaches that may undermine predictability and consistency and perhaps, it may have decreased the extent that smaller courts follow the Hoge Raad. However, in cases where the Hoge Raad has developed guidance, lower courts have not followed it, without referring to CJEU decisions that justify not following the Hoge Raad. Although the lack of interaction between the Hoge Raad and the CJEU may not directly be problematic for private parties, it may undermine consistency if CJEU decisions and Hoge Raad decisions are not easily reconcilable and lower courts do not consistently follow the CJEU[2008] or the Hoge

[2003] See further par. 11.3.3.5.
[2004] Ktr. Rotterdam 2 August 2007, *Prg*. 2008, 37. Comp. also Ktr. Maastricht 16 July 2008, *NJF* 2008, 397, Ktr Hoorn 10 April 2006, *NJF* 2007, 252 and Ktr. Zaandam 31 July 2008, *Prg*. 2008, 192. on a contract for a duration of two years. The court assumed that the consumer had meant to challenge the fairness of the clause that required the contract, entered into by phone, with a mentally handicapped man would have to be cancelled in writing – which the consumer, a mentally handicapped man, was not capable of – could not be cancelled prematurely. The court decided this clause was unfair under article 6:237 sub k BW.
[2005] Hof Amsterdam 8 March 2011, *NJF* 2011, 242, as well as Hof Amsterdam 13 September 2011, *NJF* 2011, 421.
[2006] CJEU 30 May 2013 (Brusse and Garabito v Jahani BV), C-488/11, [2013] ECR, p. I-0.
[2007] Hof Amsterdam 21 February 2012, *BR* 2012, 89.
[2008] For example CJEU 14 June 2012 (Banco Español de Crédito v Calderón Camino), C-618/10, [2012] ECR, p. I-0.

Raad. However, lower courts have only seldomly referred to the CJEU decision rather than the Hoge Raad.

Yet the questions that have been referred to the CJEU mean that previous decisions from the Hoge Raad are incorrect and should be revised. Thus, the decisions of the Hoge Raad have undermined predictability.

11.4.2.3. Conclusion on model lists

Although the legislator has recognised the use of comparative insights in the development of model lists, and have benefitted from these insights, courts have not recognised interdependence. Interdependence has become especially visible between the Hoge Raad and the CJEU, both in cases where the role of the Hoge Raad is diminished as its decisions are difficult to reconcile with CJEU decisions and cases where the the Hoge Raad has provided some guidance. In these cases, the restrraint of lower courts in following the Hoge Raad can much less easily be explained by diverging CJEU decisions. Thus, does the role of the Hoge Raad decrease because of decisions that diverge from the CJEU, because of a lack of guidance, or otherwise?

Possibly, as not many consumer cases come before the Hoge Raad, the extent to which the Hoge Raad can develop a consistent line in these cases may be limited. Even if this were the case, the current amount of cases diverging from the Hoge Raad may give rise to doubts whether a more active approach from the Hoge Raad will suffice.

Referring more cases to the CJEU would not be likely to strengthen the role of the Hoge Raad as CJEU decisions are not easy to predict and the CJEU may not necessarily decide in a manner consistent with surrounding national law if it is insufficiently aware of relevant provisions. Moreover, the CJEU is also not well placed to decide in accordance with national practice and national legal views on justice.

Arguably, recognising the interdependece between the Hoge Raad and the CJEU, as well as the need for lower courts to take into account one another's decisions, would improve consistency and predictability. Moreover, referring more questions to the CJEU could in the long term benefit the responsive development of Directive 93/13, even though it might decrease predictability in individual cases.

11.4.3. The evaluation of international and domestic business contracts

This paragraph will consider whether actors, in the evaluation of international business contracts, have recognised that the initatives of other actors may also be relevant for the evaluation of clauses and interacted with these actors accordingly. How has this affected the extent to which blanket clauses strengthen the predictability, consistency, accessibility and responsiveness of the law of STC's for international business contracts?

Paragraph 11.4.3.1. will consider preliminary questions on the applicability of Dutch law on STC's in international contracts. Paragraph 11.4.3.2. will turn to the evaluation of clauses under the Montréal Convention (previolusly the Warsaw Convention) and paragraph 11.4.3.3. will address the evaluation of clauses under the CMR. Paragraph 11.4.3.4. will consider the evaluation of CISG and Dutch law. Paragraph 11.4.3.5. will compare decisions in international cases to the evaluation of clauses in domestic business contracts. Paragraph 11.4.3.6. will end with a conclusion.

11.4.3.1. Applicable regimes

Which regime can be applicable to international contracts? Possible applicable regimes include the Montréal Convention, the CMR, the CISG as well as Dutch law.

If Dutch law is applicable, article 6:247 BW stipulates that articles 6:231 et seq are not applicable for cases in which one of the parties is situated abroad, even if they have opted for Dutch law, which has recently been confirmed by the Hoge Raad.[2009] The Dutch legislator[2010] aimed to prevent unpredictability and inconsistency by imposing the mandatory regime of articles 6:231 et seq BW on international contracts that were already subject to the regime of other legislators, ad also sought to facilitate international trade.

The Dutch legislator was inspired by the English Unfair Contract Terms Act 1977. Consequently, international contracts are not evaluated under article 6:233 or 236 and 237 BW. The debate in Parliament especially considered the necessity of article 6:247 BW against the background of Rome I, and decided to provide an exception for contracts with consumers in article 6:247 par. 4 BW. Notably, this rule diverges from article 6 Rome I, but it goes beyond article 6 par. 2 Directive 93/13 that stipulates that Member States shall ensure that consumers will not lose the protection conferred upon them through a choice of law for non-Member States. Therefore, article 6:247 par. 4 BW is permissible under article 8 Directive. Thus, the European legislator, by inserting provisions on private international law in consumer contract law Directives, has provided Member States with possibilities to diverge from Regulation Rome I, which diminishes the extent to which the Regulation increases the accessibility of law.

As international contracts are not evaluated under article 6:231 et seq BW, the question whether an international regime that provides an exhaustive regime that allows for the additional application of national provisions becomes less urgent. However, the question arises whether article 6:248 BW may still be applicable for the evaluation of international contracts. According to Hartkamp,[2011] this article can be applied by the judge of his own motion, which would indicate that it is a provision of public policy.

However, the suggestion that this provision is a provision of public policy is contradicted by decisions of the Hoge Raad that article 6:248 par. 2 BW is not applicable in addition to the Warsaw Convention[2012] and the Hague Visby Rules as well as the IMCO International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships.[2013]

This will generally be the case if international regimes expressly leave room for the additional application of national law, as is the case for the CISG, as article 4 sub a CISG expressly provides that the validity of contracts, or any provisions, is not a matter decided under the CISG, which entails that clauses in contracts falling under the CISG can be evaluated under Dutch law, in particular article 6:248 BW as article 6:231 et seq BW are not applicable to international contracts.[2014]

The Hoge Raad[2015] has emphasised that the question whether a clause is contrary to article 6:248 par. 2 BW, goes beyond the question whether invoking this clause is in

[2009] HR 11 May 2012, *NJ* 2012, 318.
[2010] Parl GS (Inv 3, 5, and 6), p. 1807.
[2011] Asser/Hartkamp/Sieburgh (2010), 6-III, nr 395.
[2012] HR 12 February 1982, *NJ* 1982, 589, HR 24 April 1992, *NJ* 1992, 688.
[2013] Respectively HR 11 February 2008, *NJ* 2008, 505 and HR 4 November 1994, *NJ* 1996, 534.
[2014] Comp. Rb. Arnhem 29 July 2009, *RCR* 2009, 69 where the court held that the lien of goods was irreconcilable with standards of fairness. Comp. also Rb. Rotterdam 31 March 2010, *LJN* BN2112.
[2015] HR 15 October 2004, *NJ* 2005, 141. HR 27 April 2007, *NJ* 2007, 262 that concerned a penalty clause in a domestic business contract, emphasized a similarly restrictive approach towards article 6:94 BW. Comp. also the conclusion of A.-G. Wuisman before HR 18 February 2011, *RvdW* 2011, 288.

accordance with good faith. Instead, the court should indicate why good faith entails that invoking a clause is unacceptable in these circumstances.

11.4.3.2. The evaluation of clauses under the Montréal Convention

The Montréal Convention, previously the Warsaw Convention, aims to provide a comprehensive regime. Very few decisions of the Hoge Raad are available and it is therefore difficult to deduce a consistent approach from the case law of the Hoge Raad. The Hoge Raad[2016] has however held a clause that limited liability ineffective under the Warsaw Convention. The Hoge Raad referred to the legislative history of the Treaty and held that this clause was void as it was contrary to article 26 of the Convention. The conclusion of the A.G. expressly considered international materials as well as comparative law.

11.4.3.3. The evaluation of clauses under the CMR

The Hoge Raad has recognised the needs and preference of businesses and has interpreted the law in accordance with especially national preferences and views, but les swith international preferences.

The Hoge Raad[2017] has evaluated clauses opting for the CMR leniently, despite to wording of article 8:1102 par. 1 BW that aimed to prevent that parties would be surprised by this regime,[2018] in accordance with the preferences of businesses. Especially professional parties that have expressly referred to the CMR and that have done business with one another for various years should be assumed to be aware of the differences, and they should therefore not be required to copy out the reference to the CMR.

The Hoge Raad has also interpreted the concept of 'wilfull misconduct' strictly,[2019] in accordance with article 8:1108 BW, but also in accordance with national practice.[2020] However, Dutch law diverges from the CMR with regard to the limitation of liability that can be imposed despite wilful misconduct. The carrier might therefore well prefer the application of Dutch law rather than the CMR.

The Hoge Raad has not consistently referred to international materials. Haak[2021] has noted that the line of the Hoge Raad has changed. Different from previous decisions, in which international materials were carefully considered (in the conclusions of the A.-G.'s),[2022], it now suffices with referring to article 29 CMR.[2023]

However, in more recent decisions, the conclusions of the A.G., in some cases expressly followed by the Hoge Raad, have expressly referred both to different linguistic versions and foreign decisions and literature.[2024]

[2016] HR 12 February 1982, *NJ* 1982, 589, comp. the conclusion of A.G. Franx under par. 6.
[2017] HR 10 August 2012, *NJ* 2012, 652, similarly HR 29 May 2009, *NJ* 2009, 245. HR 5 January 2001, *NJ* 2001, 391, see the conclusion of A.-G. strikwerda in pars. 16-17.
[2018] Parl. GS (Book 8), p. 1052.
[2019] Thus, leaving containers unattended near the public road during the weekend did not sufficiently constitute wilful misconduct in this sense.
[2020] Note to *NJ* 2001, 391.
[2021] Note to *NJ* 2001, 392.
[2022] Comp. HR 29 June 1990, *NJ* 1990, 106, and HR 14 June 1996, *NJ* 1997, 703, where the Hoge Raad considered the different linguistic versions as well as relevant international materials, encouraged by A.-G. Haak, as well as HR 16 November 1990, *NJ* 1992, 107, where it refers to the conclusion that expressly considers German law.
[2023] Comp. in particular also HR 29 May 2009, *NJ* 2009, 245.
[2024] Comp. the conclusion of. A.-G. Timmermans to HR 10 August 2012, *NJ* 2012, 652, HR 14 July 2006, *NJ* 2006, 599, as well as HR 19 November 1998, *NJ* 1999, 175.

Thus, although the Hoge Raad recognises the added value of foreign materials, this approach need not necessarily be continued in future decisions, which may limit the responsiveness of the law to the needs of internaitonal practice as well as predictability.

11.4.3.4. The evaluation of clauses in international contracts under Dutch law

The Hoge Raad's decisions show an increasing tendency to limit the effect of article 6:248 BW in international commercial contracts,[2025] which may strengthen the predictability of the law on STC's, in accordance with the preference of experienced parties in international trade. The restraint of the Hoge Raad is also in accordance with the view that good faith should play a limit role in cases where experienced parties in an equal bargaining position have been assisted by legal counsel.

Accordingly, the Hoge Raad[2026] upheld an exclusion clause that also excluded liability for serious breaches of contract by a shipyard, caused by contractors in the sense of article 6:170 BW. It concerned a clause between two branches regularly doing business with one another that is usual and not contrary to good faith.

Similarly, the Hoge Raad[2027] upheld an expiration clause in an international contract between a bank and a business. The Hoge Raad took article 6:140 par. 2 BW as a starting point for its decision and considered that the clause was not unfair, because article 6:236 sub g BW should be seen in correlation with this article. Although article 6:236 sub g BW is not applicable in international contracts, it was relevant as the Dutch bank had apparently taken this article as a starting point in the drafting of its STC's.

Furthermore, the Hoge Raad[2028] established that an insurer is free to limit the terms of his policy, referring to a previous decision[2029] in an international case where an insurer had also limited the possibility to recover damages under the policy, which was however decided with reference to domestic case law.[2030]

Interestingly, the Hoge Raad, though referring to business practices between parties[2031] that may also be affected by foreign views[2032] did not consistently refer to international or foreign materials in international cases, but decided the cases largely in line with domestic case law.

In rare cases, clauses have been held ineffective.

The Hoge Raad[2033] held that invoking an expiration clause in an international contract was unacceptable, because the parties invoking this clause had suffered a small amount of damage, which justified a proportional limitation of the claim.

In his conclusion before the case, A.-G. Spier refers expressly to common law decisions that have also held that a complete dissolution of a contract party's claim if parties neglect any incidents because of an expiration clause is rather drastic. For insurers, this option is also rather unpractical, as

[2025] H. Schelhaas, 'Pacta sunt servanda bij commerciële contracten', *NTBR* 2008, 21,
[2026] HR 31 December 1993, *NJ* 1995, 389. In his note to the case, Brunner finds that for the evaluation of contracts in accordance with good faith, the nature of the contract, and the societal position and relation between the parties are decisive.
[2027] HR 23 February 2001, *NJ* 2001, 277. Comp. HR 14 May 2004, *NJ* 2006, 188, where invoking a clause on the dissolution of rights was held irreconcilable with standards of fairness as it was contrary to Dutch legal views on justice in the sense of article 3:12 BW.
[2028] HR 16 May 2008, *NJ* 2008, 284.
[2029] HR 9 June 2006, *NJ* 2006, 326.
[2030] HR 27 October 2000, *NJ* 2001, 200.
[2031] Comp. HR 31 December 1993, *NJ* 1995, 389.
[2032] Comp. HR 17 February 2006, *NJ* 2006, 378,
[2033] HR 17 February 2006, *NJ* 2006, 378, comp. the conclusion of A.-G. Spier under par. 4.41.

cautious policy holders might report each and every small incident, which imposes a considerable workload on insurers.

Thus, the Hoge Raad has taken into account business practices and foreign views, but decided cases in accordance with national law. The emphasis on business practices however entails that decisions are likely in accordance with business practices even if the Hoge Raad does not refer to international materials.

11.4.3.5. The evaluation of domestic "black" and "grey" clauses under Dutch law

Good faith is invoked in a considerable amount of business contracts,[2034] but the Hoge Raad exercises restraint in holding clauses ineffective under article 6:233 sub a BW.

The Hoge Raad[2035] may refer to article 3:12 BW that refers to legal views in society to establish whether a clause is contary to good faith under article 6:248 par. 2 BW. The Hoge Raad may also refer to surrounding law, such as the principles of good administration, in this case in the evaluation of a contract between a business and a municipality.

Similarly, the Hoge Raad[2036] held that a clause that stipulates that rights to compensation of the insured expire after a year is contrary to good faith under article 6:248 BW if the insurer does not warn the insured that he will invoke the expiration of the claim. The Hoge Raad also refers to article 3:12 BW and refers to the council that handles dispute resolution for the Dutch Association of Insurers to determine these views. The Hoge Raad finds that if this council considers a practice to be detrimental to the reputation of insurance, that practice is likely to also be contrary to good faith.

In some cases, the Hoge Raad[2037] has upheld the decision that invoking a clause (in this decision an exclusion clause) was contrary to article 6:248 par. 2 BW, pointing to the extensive factual circumstances that the court of appeal had considered in its decisions. Wessels[2038] has criticized decisions of the Hoge Raad that held that invoking clauses that undermined the main terms of the contract were contrary to good faith.

For domestic business contracts, articles 6:236 and 237 BW are not applicable. The decision of the legislator to exempt domestic business contracts from these clauses was based on experiences by foreign legislators that had also opted to exempt clauses in business contracts from evaluation under black or grey lists.[2039] Moreover, article 6:235 BW further limits possibilities for some business to invoke the avoidability of STC's under article 6:233 sub a BW.

Generally, the Hoge Raad has shown restraint in allowing articles 6:236 and 6:237 BW to influence the evaluation of clauses in domestic business contracts under article 6:233 sub a BW.

Thus, the Hoge Raad[2040] showed restraint in a case where the court of appeal had referred to article 6:236 BW in its decision that invoking these clauses was contrary to good faith. The Hoge Raad[2041] also showed restraint in a case where the court of appeal held that an exclusion clause was contrary

[2034] See further A.S. Hartkamp, AA 2012, p. 52.
[2035] HR 9 January 1998, *NJ* 1998, 363.
[2036] HR 24 May 2004, *NJ* 2006, 188, following HR 12 January 1996, *NJ* 1996, 683.
[2037] HR 5 September 2008, *NJ* 2008, 480.
[2038] B. Wessels, 'Drie vuistregels voor de uitleg van algemene voorwaarden', *WPNR* 6239 (1996), p. 720-721.
[2039] Parl. GS (Inv. 3, 5, and 6), p. 1661.
[2040] HR 15 October 2004, *NJ* 2005, 141.
[2041] HR 18 June 2004, *NJ* 2004, 585.

to good faith, referring to article 6:237 BW. Lower courts[2042] seem, on occasion, to adopt somewhat less restraint towards the indirect effect of articles 6:236 and 237 BW, although this does not mean that they decide cases in accordance with the Directive.[2043] The indirect effect of articles 6:236 and 237 BW depends on the contract party invoking the avoidability and the indirect effect of articles 6:236 and 237 BW. It has been argued that indirect effect should be allowed if legal persons invoking it are in a bargaining position that is similar to the consumer, while the contract should not be different from regular consumer contracts.[2044]

Interestingly, the approach of the BGH on this matter is well-developed, but the Hoge Raad has not referred to German developments.

Thus, the Hoge Raad has referred to business practices and non-state actors initiatives in evaluating whether a clause is unfair, which will not often be the case. In turn, this benefits the predictability of the law. Moreover, the restraint of the Hoge Raad may enhance the ability of contract parties to negotiate on STC's and subsequently rely upon these clauses, in accordance with predictability.

11.4.3.6. Conclusion on the evaluation of clauses in international contracts

Decisions of the Hoge Raad do not reveal a clear approach towards foreign and international materials. The Hoge Raad has recognised the added value of foreign insights and international materials to determine parties' expectations and business practice, both in cases decided under internaitonal regimes and under Dutch law, which is beneficial for the responsiveness of the law to international trade. That does not mean that the Hoge Raad consistently refers to these materials, and the use of these materials may be difficult to predict.

Moreover, the Hoge Raad decided international cases in accordance with national law, which may benefit consistency as well as the responsiveness of the law to national practice and national legal views on justice. If national law however differs from international law, this may diminish the responsiveness of the law to international trade.

11.4.4. Conclusion on blanket clauses

Have actors in the development of the law on STC's through blanket clauses adequately recognised interdependence and have they interacted accordingly? How has that affected the extent to which article 6:233 sub a BW improves the predictability, consistency, accessibility and responsiveness of the law on STC's?

Although especially the Dutch legislator has recognised the added value of comparative law, interdependence between Dutch and European actors has not been recognised as such. As a result, Dutch actors have not sought to limit the extent to which European actors may influence the drafting and interpretation of blanket clauses or model lists to help the predictable and consistent development of the law through blanket clauses. If European actors gains more competence to draft, amend or interpret blanket clauses, the extent to which national blanket clauses may contribute to the responsiveness of the law

[2042] Comp. B. Wessels, 'Reflexies bij reflexwerking'. *WPNR* 6240 (1996), p. 725, who signalled that courts had started to apply these articles. Indirect effect of these articles is visible in for example Ktr. Leiden 26 August 2009, *RCR* 2009, 79. Comp. also, implicitly, Ktr. Zaandam 9 August 2001, *Prg*. 2001, 5756. See earlier also Ktr. Middelnburg 23 November 1998, *Prg.* 1999, 5130, Ktr. 's-Gravenhage 18 February 1998, *Prg*. 1998, 4961, Rb. Zwolle 14 August 1996, *Prg*. 1996, 4635. Comp. Rb. '-Gravenhage 12 January 2011, *RAV* 2012, 29, rejecting a claim based on article 6:236 BW on the basis that the Parliamentary history clearly shows that the legislator did not intend a clause as challenged in this case to be unreasonable under article 6:236 BW.
[2043] This has been rejected in Rb. 's-Hertogenbosch 18 April 2012, *NJF* 2012, 343.
[2044] J. Hijma, *Algemene voorwaarden*, Kluwer: Deventer 2010, with further references to case law.

diminishes. The extent to which model lists support the predictable and consistent interpretation of blanket clauses, as well as the accessibility of the law, may also diminish as overlapping lists develop.

The interdependence between the CJEU and the Hoge Raad has also not adequately been recognised. Consequently, the restraint of the Hoge Raad in referring questions to the CJEU and the inconsistency of its decisions with CJEU decisions, and possibly the Directive, have undermined the role of the Hoge Raad, which in turn has aggravated the development of inconsistent and unpredictable case law from lower courts.

The development of inconsistent and unpredictable case law may however not only be attributed to the restraint of the Hoge Raad but also to the lack of interaction between and from Dutch courts that is not visible in the German legal order.

Nevertheless, these developments have not been addressed in the reform of Directive 93/13. Questions that have arisen from the development of the law on STC's in the German legal order, in particular the allocation of competences between courts in the interpretation of national law implementing Directive 93/13, and the obligation of legislators to implement the model list in the Annex to the Directive, have also not been considered in the Dutch legal order. Thus, the lack of interaction between national and European actors may decrease the responsive development of Directive 93/13.

Notwithstanding the use of comparative law by the legislator, neither the Hoge Raad nor lower courts take into account foreign decisions in the evaluation of clauses under articles 6:233 sub a BW or article 6:236 and 237 BW. However, lower courts and the Hoge Raad have recognised the added value of foreign materials in decisions under international regimes.

The differences in the approach may be explained by the easier availability of foreign decisions under the CISG. Also, especially for decisions in lower courts, the relative straightforwardness of cases that do not require referral to the CJEU or to foreign materials may be a reason for less referral. Moreover, the evaluation of clauses under articles 6:231 et seq BW concerns the interpretation of national law, and referral to foreign cases may lessen the consistent development of the law on STC's by national law as well as the development of the law in accordance with national practice and national legal views on justice. The use of foreign materials may also lessen the predictability of law if there is no consistent approach to foreign materials and if parties are not familiar wioth foreign cases.

11.5. Principles

What principles have played a role in the development of the law on STC's, have these principles provided a starting point for interaction between actors and how has that affected the extent to which principles have contributed to the predictability, accessibility, consistency and responsiveness of the law on STC's?

In particular, this paragraph will consider three principles that have played an important role in the development of the law on STC's:

1) The principle of good faith, or fairness, visible in article 6:233 sub a BW
2) The principle of consumer protection
3) The principle of party autonomy, which, in Dutch reasoning, shows remarkable similarities with the *Richtigkeitsgewähr*.

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Paragraph 11.5.1. will consider principles underlying Dutch law[2045] and paragraph 11.5.2. will point out in which ways the development of Dutch law converges with the development of Directive 93/13 and paragraph 11.5.3 will ask in which ways the development of Dutch law diverges from the development of Directive 93/13. Paragraph 11.5.4. will end with conclusions.

11.5.1. The development of the Dutch law on STC's on the basis of principles

The development of articles 6:231 et seq BW was based on principles of good faith, consumer protection and party autonomy.

Nieuwenhuis[2046] finds that because the unequal position of contract parties and the resulting prevalence of one party, good faith obliges the party drafting STC's to take in accordance the legitimate interests of contract parties. Accordingly, in the evaluation of STC's, the position of parties plays a role. This was already decided by the Hoge Raad[2047] in a judgment preceding the BW. The legislator[2048] remarked that then draft article 6:233 sub a BW did not aim to provide different criteria, and noted that German law had developed efficient control on the basis of good faith in article 242 BGB. Article 6:233 sub a BW therefore includes that the question whether a clause is unfair should be decided in accordance with the way they have been drafted, the mutual recognisable interests of parties as well as other relevant circumstances, which include the capacity of parties.[2049]

Moreover, consumer protection has also played a role in the development of articles 6:231 et seq BW that were developed also against the background of consumer protection. However, the protection of STC's is not limited to consumers but instead takes the position of the party subjected to STC's as a starting point.

Notably, Nieuwenhuis[2050] finds that the unequal position of contract parties with regard to STC's is situated in the 'occupation' of private autonomy by one contract party – an idea in accordance with the principle of *Fremdbestimmung*. Accordingly, in the discussion in Parliament, one of the underlying ideas was that parties subjected to STC's should be

[2045] The development of Directive 93/13 and underlying principles have been discussed previously in par. 11.5.1. and will therefore not be discussed separately.
[2046] Nieuwenhuis 1978, p. 145.
[2047] HR 19 May 1967, *NJ* 1967, 261.
[2048] Parl GS (Inv 3, 5, and 6), p. 1586-1587.
[2049] See for example HR 15 December 1995, *NJ* 1996, 318.
[2050] Nieuwenhuis 1978, p. 145.

protected, as parties will only exceptionally have the possibility to influence the content of STC's and generally are unfamiliar with the content of STC's. This meant that not only consumers could be subjected to unfair terms – businesses, depending on their bargaining position, could also be exposed.[2051]

However, negotiations on STC's may indicate that a clause is not unfair, as recognised in article 6:233 sub a that stipulates that one of the circumstances relevant for the evaluation under this article is the way in which a clause has been drafted. This is in accordance with the idea of *Richtigkeitsgewähr*. However, the Hoge Raad[2052] has since ruled that this limitation aimed to prevent the introduction of the *iustum pretium* doctrine that would oblige judges to evaluate whether the main terms of the contract were sufficiently balanced.

Clearly, the principles may show significant overlap. Accordingly, business dealing with parties in weak bargaining positions, especially consumers, may not impose their conditions on these parties but rather should take the interests of these parties into account, in accordance with the idea of good faith. Parties in stronger positions, especially international businesses, are not illogically considered to be in less need than consumers. Theoretically, the idea that "strong" consumers are not protected as the court may take into account that a consumer had a realistic opportunity to influence the STC's is possible, although the legislator considered this possibility as rather unlikely: even if a consumer is in a strong bargaining position, he will generally contract over a matter only once, while the user of STC's is typically a repeat player, who may also simply choose to contract on the basis of his STC's or not at all, regardless of the resources and expertise of the consumer.[2053]

Thus, these principles have played an important role in the development of the law on STC's. The legislator has taken these principles, which formed a starting point for the development of German law, as a source of inspiration.

11.5.2. Principles underlying the law on STC's: similarities

Various similarities with regard to the principles of good faith and consumer protection become visible the law on STC's at the national and European level.

1) Both at the national and European level, good faith play a central role in the assessment of clauses.

Thus, like the Dutch and German legislator, the European legislator takes good faith as a starting point that enables for an overall evaluation of the interests involved in the contract, although it is not uncontroversial whether this concept should be interpreted uniformly.

2) Dutch and European law has developed against the background of consumer protection.

Although article 6:233 sub a BW is also applicable more broadly, it has become especially relevant for the evaluation of clauses in consumer contracts. Interestingly, despite the weaker position of consumers, the European legislator has also recognized the added value of negotiations between stakeholder groups and may therefore also consider the possibilities for collective negotiations on STC's in consumer contracts. Both the Dutch and the European approach are more lenient towards STC's in business contracts.

[2051] Parl GS (Inv 3, 5, and 6), p. 1452-1453, 1455.
[2052] HR 19 September 1997, *NJ* 1998, 6.
[2053] Parl. GS (Book 6), p. 1496.

3) Both the Dutch and European legislator has recognised the added value of the use of STC's.

Thus, these basic ideas underpin both national law and Directive 93/13.

11.5.3. Principles underlying the law on STC's: divergences

Differences between the development of the law on STC's at the national level and the European level also exist:

1) The principle of consumer protection does not justify the conclusion that the development of the *acquis* is based on the principle of protection of weaker parties.

2) The principle of private autonomy is also recognised at the European level, but the European legislator has not referred to the *iustum pretium* doctrine. Instead, the European legislator held that the protective aim of the Directive allows for extending judicial evaluation of STC's to the main contract terms.[2054]

However, these differences however do not mean that these principles cannot form a starting point of interaction between actors.

11.5.4. Conclusion on principles underlying the law on STC's

Thus, principles may form a starting point of interaction between actors, and princuiples underlying one set of rules may inspire other actors in developing the law, although that does not mean that these laws will develop similarly. The differences between principles underlying the law, or the different weight that is attached to these principles, or the different role that principles play in the development of the law, need not stand in the way of interaction or common developments on the law of STC's throughout Europe.

However, although principles can form a starting point for interaction, they have not visible improved the quality of the law on STC's. However, the extent to which general principles can contribute to the responsive development of the law on STC's is limited as different principles play a role in the development of the law on STC's at the national and the European level. This is generally not visible as the development of Dutch law and the *acquis* on the basis of general principles does not show dramatic differences that stand in the way of interaction.

[2054] CJEU 3 June 2010 (Caja de Ahorros), C-484/08, [2010] ECR, p. I-4785.

11.6. Conclusion on the development of the law on STC's through national techniques

Generally, the development of private law takes place through codification, blanket clauses, and general principles. However, other actors also develop private law and therefore, the ability of actors to safeguard benchmarks of predictability, accessibility, consistency and responsiveness through these techniques has been diminished. Because actors have not taken into account their dependence on other actors in ensuring that private law meets these benchmarks, they have not interacted with other actors accordingly, which has undermined the preddictability, accessibility, consistency and responsiveness of European private law.

In the law on STC's, interdependence has clearly developed, which means that the extent to which actors can ensure the comprehensiveness of the law on STC's through the use of national techniques has become limited.

Particularly, this means:

1) The development of the *acquis* has limited the extent to which national actors may ensure the predictable, accessible, consistent and responsive development of the law on STC's in the BW. Moreover, the extent to which codifications can deal with the development of international trade and guarantee predictability, consistency, accessibility and responsiveness as treaties are developed, becomes limited.
2) The extent to which blanket clauses may contribute to the consistent and responsive development of the law on STC's has been diminished because of the development of blanket clauses and other relevant measures, as well as international sources of law that may affect the interpretation of blanket clauses.
3) The extent to which general principles can contribute to the responsive development of the law on STC's is limited as different principles play a role in the development of the law on STC's at the national and the European level.

It follows that, theoretically, in order to ensure that private law develops in accordance with these benchmarks, actors must recognise interdependence and interact with each other accordingly. In particular, interaction between European and national state actors is necessary. Also, to ensure that the Dutch law on STC's is in accordance with the needs of international trade, interaction between the Dutch legislator and foreign legislators as well as non-state actors is necessary. Interaction between Dutch courts, foreign courts, European actors and international actors is also necessary.

The Dutch law on STC's is not known as a typical success story, or a failure, but it has experienced some problems. Can these problems be traced to a lack of interaction? Paragraph 11.6.1. will consider whether this is the case in the implementation of Directive 93/13. Paragraph 11.6.2. will discuss the law on STC's and international trade and paragraph 11.6.3. will consider starting points for more and better interaction.

11.6.1. The law on STC´s and the implementation of Directives

Actors have not recognised interdependence in the use of national techniques. Nevertheless, the development of the *acquis* did prompt the Dutch legislator to consider the development of separate laws. This suggestion did however not mean that the legislator reconsidered the development of the BW as such or considered ways to compensate for the diminished ability of national techniques to ensure the comprehensibility of the law on STC's and private law more generally. Rather, the brief suggestion to develop the law on STC's

separately demonstrated that, at least for central areas of private law, the development of separate legislation would severely complicate the development of the law on STC's.

Thus, **even if actors have not considered interdependence, this might have made little difference**, as it would and should not have led to techniques that would have replaced or undermined codifications, blanket clauses, and general principles. Notably, the *acquis* only stipulates a relatively small part of private law compared to the bulk of private law that is still stipulated, apparently satisfactorily, in the BW.

Thus, a choice for different techniques might also have important consequences for a large part of private law. However, especially in the light of the more horizontal approach visible in the *acquis*, maintaining the role of codes becomes more rather than less important. Interaction becomes more important to maintain the extent to which national techniques ensure the predictability, accessibility, consistency and responsiveness and actors developing the law on STC's, and private law more generally, need to take the need for interaction, and the need to ensure the development of private law in accordance with these benchmarks, into account.

Dutch law on STC's was not gradually developed, as was the case in the German legal order; instead, the law on STC's was established by the BW and accordingly, it was not clear how these rules would develop in practice. Nevertheless, the Dutch legislator adopted a defensive approach in maintaining the law on STC's and assumed that it was of good quality. Yet Dutch courts have not carefully maintained the quality of the law on STC's by carefully following the Hoge Raad and one another's decisions. Rather, the approach of some courts seems directed at consumer protection, while some courts seem stubbornly opposed to ruling in favour of consumers. Perhaps because of these differences, the approach of Dutch actors in the development of Directives is not as visibly aimed at safeguarding the quality of the law on STC's. **The obligations between European and national actors therefore seem less oddly divided than is the case in the German legal order.**

The relatively abrupt introduction of the law on STC's also made it considerably more difficult to defend that the *acquis* should develop in accordance with national law. Fortunately, however, the German legislator did have a prominent role in the European debate and Dutch law was inspired by German law. Interaction did not take place in the light of interdependence, but it did have as aim to limit consequences for newly established law.

Nevertheless, **some weaknesses in the law on STC's and in the interaction between actors have become apparent and have reinforced one another**. Particularly, the debate on the implementation of the Directive was limited and in later harmonisation initatives, Dutch actors barely participated in European debate preceding Directives. This limtis the extent to which Dutch actors can influence the development of Directives. After Directives have been established, the debate on implementation also remains limited. Legislators and courts have subsequently adopted restraint in implementing and applying the Direcive. This approach has however less successful than in the German legal order for several reasons:

i) The restraint of the Dutch legislator went further than other legislators and attracted the attention of European actors.
ii) Dutch law was not as well developed as German law. Weaknesses that had not been sufficiently addressed in legal practice became problems as the *acquis* developed and the CJEU started to play a role.

iii) The restraint of courts also entailed that courts did not compensate for shortcomings of the law that became apparent in practice and that courts did not look to one another, particularly the Hoge Raad, for guidance, but rather the CJEU.

That does not mean that the role of the CJEU is problematic as such. Rather, Dutch experience shows that European actors may also prompt development of the law in accordance with national legal views on justice.

iv) Weaknesses in the law on STC's were also not improved by harmonisation.

The implementation of Directives 93/13, 2000/31 and 2006/123 did not prompt the Dutch legislator to critically reconsider its laws after harmonisation had been established. When the 1993 Directive was established, insufficient time had passed to allow for a critical evaluation of national law. However, the development of and the difficult implementation of subsequent Directives, as well as the suggestions for the reform of Directive 93/13, also did not prompt reconsideration, despite suggestions to adapt national law.

Moreover, Dutch courts have taken a much less active approach in the development of the law on STC's than German courts, which has resulted in inconsistency and unpredictability.

The different approach of German and Dutch courts may also be traced to the development of the law on STC's by German courts, which simultanously makes it less likely that lower courts will change their approach and start referring to the CJEU. Perhaps, the lack of interaction between courts may also be traced to the initial judicial development of the German law on STC's. The prominent role of the courts in the development of the law on STC's may have instilled a habit in German lower courts to pay more attention to other lower courts and the BGH. However, it is also possible that German lower courts simply adopt a more thorough approach. In other areas where Dutch courts have played an active approach in the development of the law, Dutch lower courts refer to the Hoge Raad rather than decisions from other lower courts.

In contrast, Dutch courts show less restraint in referring questions to the CJEU. An explanation for this difference may be that Dutch courts were prompted by the CJEU that clearly and directly imposes obligations while guidance from the Hoge Raad was less available.

Therefore, the lack of interaction has led to inconsistency and unpredictability, which is likely also not in accordance with the needs and preference of businesses.

Unfortunately, also, the approach of the Dutch judiciary may have limited the extent to which article 6:233 sub a BW can reduce the need for legal reform. Accordingly, German law has not been reformed, although this can probably also be traced to the emphasises on restraint by the German legislator.

Notably, restraint in interacting with other actors need not always be detrimental. Both German and Dutch courts have adopted restraint in referring to foreign materials in deciding cases under respectively articles 305 et seq BGB and articles 6:233 sub a BW. Restraint may be in the interest of predictability and consistency, as well as responsiveness to national legal views on justice and national practice.

However, in some instances, referral to foreign decisions could have prompted courts to consider the evaluation of clauses mroe critically.

In particular, the Hoge Raad[2055] upheld a decision from the court of appeal, stating that the discretion of the judge to mitigate a penalty clause under article 6:94 BW was relevant for assessing whether the penalty clause was unfair. This approach can be contrasted with the approach of the BGH,[2056] and the

[2055] HR 24 March 2006, *NJ* 2007, 115. See before this case, similarly, Ktr. Amsterdam 1 March 1996, *Prg*. 1996, 4601.
[2056] BGH 31 May 2012, *GRUR* 2012, 949.

German controversy on '*Geltungserhaltende Reduktion*' and '*ergänzende Auslegung*' that emphasises that changing STC's that are unfair to STC's that are barely allowed, rewards users of STC's that are encouraged to remain using unfair terms in contracts that shall be adapted by the judiciary until they are acceptable.[2057]

In the long term, moreover, the lack of interaction may entail that relevant points are not addressed in the reform of Directives.

i) The obligation of courts to assess clauses of their own motion
ii) The allocation of competences between the CJEU and national courts to interpret blanket clauses

Both the BGH and the Hoge Raad have cited *Freiburger Kommunalbauten* to underpin national courts' competence to assess the fairness of contract terms and have not regarded subsequent CJEU case law.

However, even if the reform of Directive 93/13 leads to more clarity on the competence with regard to the interpretation of article 3 Directive, this does not mean that a similar allocation of tasks can be assumed for the interpretation of blanket clauses in other Directives – for example, the allocation of tasks may differ depending on the degree of harmonisation pursued by a Directive.

iii) The implementation of Directive 2000/31 and Directive 2006/123
iv) The obligation of the legislator to implement the model list in the Annex to Directive 93/13.

The Hoge Raad has provided more clarity on the status of the model list in the Annex to Directive 93/13. It would be interesting to see whether the view of the Hoge Raad would be shared by the CJEU or by European actors in the reform of Directive 93/13.

Consequently, **the lack of interaction between national and European actors may lead to a circle**: because of a lack of interaction, reformed Directives do not adequately respond to national experiences, whcih increases the chances that legislators and courts will adopt restraint in implementing and applying national law implementing Directive, and so on.

Moreover, the restraint of especially the Hoge Raad in referring to foreign cases entails that questions that have been raised in the German legal order and that may affect the role of actors and the development of the law on STC's are completely overlooked. In particular, questions on the allocation of competences between the CJEU and national courts in the interpretation of blanket clauses are not considered in Dutch debate. It might alkso have been interesting for Dutch actors to discuss the idea of the *Richtigkeitsgewähr*.

11.6.2. The development of the law on STC´s and international trade

In the development of the law on STC's, Dutch actrs have recognised the need to take into account the preferences of international actors and the value of comparative insights, especially insights from successful regimes.

German and European actors have similarly recognised the added value of comparative law. The expertise and time invested in the development of especially codifications may lead to lengthy drafting processes that diminish the willingness of national legislators to subsequently amend the law. Notably, the European legislator has a different perspective, as legal comparison is also a way to discover divergences that stand in the way of the proper functioning of the internal market.

[2057] MunchKomm zum BGB/Basedow (2012), article 306, nr 12, 28.

Interestingly, the points where Dutch law is most complicated and least accessible are the points where Dutch law has not followed German law – in particular, article 6:232 BW, the availability of STC's, and the rules on unduly surprising or unfair clauses.

Article 6:232 BW was adopted for sake of predictability, but it is not clear how it has contributed to predictability. Instead, the emphasis on the applicability and subsequent avoidability of clauses has led to tensions with European law and inconsistent case law. If clauses would not become part of a contract, if they have not been made sufficiently available, would this not mitigate these problems? Should the question whether clauses have been made sufficiently available not also be answered in accordance with general rules on STC's?

However, this suggestion does presuppose that Dutch law develops clearer rules on the availability of clauses. Filling the gap for rules on the availability of clauses in international cases would be necessary. Following the German rules on unduly surprising clauses in article 305c BGB would already add to clarity.

Of course, it is possible that article 6:232 BW less visibly plays a role in enhancing predictability. German experiences however demonstrate that it is well possible to maintain predictability if causes are simply not included in contracts.

Unfortunately, the Dutch legislator has also not been inspired by the restraint of the Germen legislator in amending the law on STC's.

However, at some points, Dutch law has not followed German law, and should continue to diverge.

In particular, the definition of STC's and the emphasis on clauses that have not been individually negotiated may have disadvantages in German law as it may motivate businesses to not negotiate on clauses. Notably, however, the distinction between clauses that have not been individually negotiated and STC's is convincing. Also, Dutch law on battle of forms have not proven less or more successful than German law, where a specific rule has consciously not been established.

Moreover, the existence of article 6:235 BW and the absence of an equivalent provision in the German legal order reflect different legal views on justice that are further reflected in German and Dutch case law and the German emphasis on the *Richtigkeitsgewähr* rather than consumer protection. Even if the role of art 6:235 BW is not very visible, and the extent to which it contributes to predictability is not clear, it should therefore be maintained.

Moreover, article 6:214 BW, which, maybe, would have been well-placed in the German legal order, considering the exemption for VOB's in article 310 BGB, remains a dead letter in the Dutch legal order and should be reconsidered.

Yet it can be doubted whether problems can be attributed to the lack of interaction between the legislator and international and foreign actors. Notably, German law has developed over an extensive period of time, and it has slowly been refined by German courts that have accordingly taken a much more active role in motivating their decisions than Dutch courts. Subsequently, national case law could be taken as a starting point for the German legislator to draft legislation.

Moreover, the approach of both Dutch and German courts in international business contracts reflect the thought that parties in international trade are in less need of protection than domestic parties.

In accordance with the different approach of legislators, the approaches of the German courts and the Dutch courts towards the evaluation of clauses in international contracts under articles 307 BGB and article 6:248 BW are rather different. German courts have adopted a relatively lenient approach towards the evaluation of clauses in international

contracts decided under German law, the strict and well-developed standard in article 307 BGB requires express motivation, for example in the form of international materials. This approach, for whatever reason, is however not reflected under CISG. Under the Dutch approach, justification is necessary for limiting the effect of clauses under article 6:248 par. 2 BW, for example through international or foreign materials or business practices. Thus, perhaps, both German and Dutch courts recognise foreign and international materials as sources that may be used – among other materials – to underpin decisions requiring extensive motivation.

Neither the BGH or the Hoge Raad has developed a consistent approach to the use of international and foreign materials, However, if the Hoge Raad had developed such an approach, it is not clear whether lower courts would have followed it, whereas this is more likely in the German legal order.

However, **the refusal of the Dutch legislator to reconsider the law on STC's may have undermined the attractiveness of Dutch law in international trade.**

Moreover, German courts continue to adopt a more thorough and active approach to the development of the law on STC's. This active approach has also helped the attractiveness of German law in international trade.

A similar development is not visible in Dutch law. Although Duch courts show less restraint in referring to international and foreign materials, as well as soft laws, in cases under international regimes, this does not happen consistently and predictably. In some cases, confusion has become visible. Possibly, German commentaries have supported the careful decisions from German lower courts. Consequently, Dutch law on STC's may develop less in accordance with international trade than international regimes. **The lack of interaction between courts, international and foreign actors in cases decided under Dutch law does not strengthen the position of Dutch law in international trade.**

Also, the lack of interaction between actors may undermine the comprehensibility of the law on STC's in international trade. The decreased interaction between courts can also be attributed to less decisions of the Hoge Raad that provide less guidance to lower courts to distinguish and apply potentially overlapping international and European regimes. Inaccessibility and inconsistency have developed as a result.

11.6.3. More and better interaction

How should the interaction between actors be adjusted?

Dutch actors need to adjust the way they interact at the European level. Particularly, Dutch actors need to become aware of interdependence and pay much more attention to the use of techniques at the European level and the influence of the use of techniques on the development of private law at the national level.

Moreover, the Dutch legislator and Dutch courts should interact more carefully with one another in order to ensure that the law on STC's develops more consistently and unpredictability.

Giesen and Schelhaas[2058] have suggested more cooperation between the legislator, judiciary and other relevant actors is also possible. Increased cooperation between the legislator and the judiciary could contribute to the development of the law more generally, ensuring that relevant experiences and insights are taken into account in the legislative process.

[2058] I. Giesen, H.N. Schelhaas, 'Samenwerking bij rechtsvorming', *AA* 2006, p. 159-172.

For the law on STC's, more cooperation between the legislator, the Hoge Raad, lower courts and the Board, as well as academics, and possibly, European and foreign actors may make actors more aware of relevant developments and problems arising in practice.

This suggestion has also been inspired by the English Law Commission that contains members from legal practice, the judiciary, as well as academics. Theoretically, more cooperation with organisations that are to facilitate the enforcement of consumer law may prompt more enforcement of articles 6:231 et seq through collective redress, which enables the court, possibly the Hoge Raad, to set clearer guidelines. Decisions in collective redress may draw more attention from lower courts that may in turn be prompted to take decisions of the Hoge Raad and lower courts more carefully into account.

The Dutch legislator should also consider national law much more critically. Future reform of Directive 93/13 could serve as a starting point for a critical reconsideration. More generally, the interaction between national and European actors should make actors more aware of national experiences in the implementation of Directives.

Also, national practices should be considered in the light of European initiatives, and national actors should play a more active role in alerting European actors to relevant or interesting practices.

In particular, Dutch ADR practices in consumer cases on STC's should be carefully considered. Currently, ADR decisions on consumer cases may contradict articles 6:231 et seq BW [2059] and diverge from the decisions of lower courts. Consistent publication of these decisions should be seriously considered, because the lack of publicity may limit parties' ability to predict the outcome of a dispute and lead to inconsistent development of consumer law in these areas with general national private law.[2060] A lack of publicitly is likely to disadvantage parties with little experience more than repeat players. Moreover, publicity may in this respect also serve as a control mechanism.[2061] The lack of publicity may also mean that a large amount of cases does not contribute to the development of the law on STC's, and the experiences of the Board and problematic cases remain invisible before they come before the courts.

Other features of current ADR practices should also be reconsidered: Loos[2062] convincingly argues that the restraint adopted under article 7:902 BW[2063] is outdated and might lead to a breach of the obligation of national actors to correctly implement the Directive 93/13. Also, Snijders[2064] has convincingly argued that changing the binding advice procedure into an arbitral procedure may offer

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[2059] For example Decision of 29 September 2009, nr 31530, at http://www.degeschillencommissie.nl/klacht-indienen/eerdere-uitspraken/31530/afwezigheid-van-7-maanden., as well as Decision of 26 July 2006, nr 32021, at http://www.degeschillencommissie.nl/klacht-indienen/eerdere-uitspraken/32021/artikel-6-237-onder-k-bw-niet-van-toepassing. and Decision of 24 August 2011, nr 34376, at http://www.degeschillencommissie.nl/klacht-indienen/eerdere-uitspraken/34376/ovk-aangegaan-voor-24-mnd-beeindigen-na-12-mnd. J.H. Wansink, 'Het KIFID en vervalbedingen: Verval van recht of recht in verval?', *AV & S* 2011, 17 has criticised the decisions of the committee on the resolution of disputes between consumers and providers of financial services, as inconsistent with case law on intentional deceit by consumers. See equally critically of the deicsions of the Board with regard to information duties the note of D.P.C.H. Hellegers under Geschillencommissue Financiële Dienstverlening 11 April 2011, *TvC* 2011, p. 160. Similarly, Ch.E. Bethlem, 'Beslechting van consumentengeschillen: hoe alternatief zijn de alternatieven?', *TvC* 2006, p. 1 pointed out that inconsistencies between the decisions of ADR committees and judicial decisions are visible, as well as inconsistencies between the judicial decisions within the same court and between different courts. Also in this sense W.A. Jacobs, *ADR en consument, Een rechtsvergelijkende studie naar de mogelijkheden van alternatieve geschiloplossing* (thesis Utrecht) Kluwer: Deventer 1998, p.189.

[2060] M.B.M. Loos, 'Individuele handhaving van het consumentenrecht', in: M.B.M. Loos, W.H. van Boom (eds.), *Handhaving van het consumentenrecht, preadviezen uitgebracht voor de Vereniging voor Burgerlijk Recht* 2009, p. 105-106. Similarly E. Bauw, 'Ruim baan voor de consument. Achtergronden en gevolgen van de verhoging van de competentiegrens van de kantonrechter', *TvC* 2010, p. 256.

[2061] W.A. Jacobs, *ADR en consument, Een rechtsvergelijkende studie naar de mogelijkheden van alternatieve geschiloplossing* (thesis Utrecht) Kluwer: Deventer 1998, p. 187-188.

[2062] M.B.M. Loos, 'Verboden exoneraties in energieleveringsovereenkomsten en vernietiging van met de wet strijdige bindende adviezen', *TvC* 2006, p. 4-5.

[2063] See HR 24 March 1994, *NJ* 1995, 23.

[2064] H.J. Snijders, 'Arbitrage en/of bindend advies bij de SGC', *TvC* 2011, p. 3.

more legal guarantees with regard to the appointment and challenging of arbitrators.[2065] In addition, the possibility to turn to ADR in cross-border cases is limited as the business to a contract has to be a member of the branche affiliated with the committee, and the consumer will have to choose to turn to the committee.[2066]

Fortunately, Directive 2013/11 on ADR for consumer disputes obliges Member States to make several of these adjustments. In partticular, the Directive imposes some requirements on the independence of individuals handling disputes as well as the transparency of ADR systems, most of which seem to be already met by the *Geschillencommissie*. In addition, by allowing Member States to retain existing ADR systems, the European legislator prevents that an additional ADR system is established that is subsequently hardly used.

However, the Directive does not require decisions to be published, and article 17 par. 4 Directive stipulates that the duty of cooperation between authorities is without prejudice to provisions on commercial and professional secrecy. Also, the Directive does not require that the procedure take the form of arbitration procedures, which may affect the cross-border enforcement of decisions, nor does the Directive consider the evaluation of ADR decisions by the courts.

However, interaction between actors will not improve if the approach of Dutch and European actors is not changed. Although the view of Dutch actors is less narrow than the view of German actors, the current approach of both Dutch and European actors falls short of interaction. Rather than considering debate as something that should be "won", and national political goals such as maintaining the level of consumer protection, or promoting maximum harmonisation, the aim of interaction should be to develop the law in a manner that is predictable, consistent, accessible and responsive.

Although this may entail that the legislative procedure at the European level is considerably lengthened, more and better debate between all relevant actors that are suficiently representative is desirable. Arguably, more and better interaction may prevent that the application and the effect of Directives in practice remain invisible in the debate, or that the *acquis* will need to be readjusted shortly after it is developed.

[2065] Notably, the evaluation of the Committee, A. Klapwijk, M. ter Voert, *Evaluatie De geschillencommissie 2009*, available at www.wodc.nl, p. 12, shows that only 46 % of consumers and 55 % of businesses in a dispute in the framework of the *Geschillencommissie* considers the committee hearing their claim as independent.
[2066] M.B.M. Loos, 'Individuele handhaving van het consumentenrecht', in: M.B.M. Loos, W.H. van Boom (eds.), *Handhaving van het consumentenrecht, preadviezen uitgebracht voor de Vereniging voor Burgerlijk Recht* 2009, p. 103.

11.7. Additional and alternative techniques

As Dutch actors have not generally recognised interdependence, they have not interacted to mitigate problems that can arise from interdependence. Similarly, actors have not sought to use techniques in addition or instead of currently used techniques. Although the use of techniques has not been considered in the context of the multilevel legal order and increasing interdependence between actors, new techniques have been developed, and techniques are usually combined.

The view of Dutch actors is not as narrow as the view of German actors that have stressed the status quo. The wider view is also visible in the participation of Dutch actors in European debate. Because of this wider view, less suggestions for additional or alternative techniques have been excluded beforehand. Accordingly, maximum harmonisation has not been rejected, despite the emphasis on the need for a high level of consumer protection, and suggestions for comitology have not been immediately rejected.

The wider view of Dutch actors can be traced to two characteristics: Dutch actors have subjected the role of non-state actors to less restrictions and do not generally reject the development of alternative rgeulation because of potential *Fremdbestimmung*. Consequently, there is more room for experimentation. Notably, Dutch actors are less focussed on maintaining the status quo as a way to ensure that the quality of the law on STC's remains high.

Thus, this paragraph will focus on techniques that may contribute to the predictability, accessibility, consistency and responsiveness of European private law.

This paragraph will not separately reconsider additional and alternative techniques at the European level that have already been considered in detail in the previous chapter, in particular the development of the CESL, model laws, and comparative research on STC's. The development of collective bargaining will be considered as actors in the Dutch legal order are familiar with the use of collectively bargaining STC's and concerns of *Fremdbestimmung* are less likely to arise.

The paragraph will however consider techniques if objections in the German legal order may entail that this technique may be more successful in the Dutch legal order.

In particular, this paragraph will consider the following techniques:

i) The use of comitology
ii) The use of alternative regulation in the interpretation of blanket clauses
iii) The introduction of a prejudicial procedure

An equivalent of the prejudicial procedure will not be found in the German legal order, as the amount of case law in the German legal order makes such a procedure quite unneccesary.

iv) The development of guidelines.

Even though the development of guidelines at the national level has proven unsuccessful, the development of guidelines has been suggested at the national level and considering the current inconsistency and unpredictable, these suggestions should at least be considered.

In contrast, this paragraph will not consider techniques that are not likely to contribute to the comprehensibility of European private law, such as the use of Regulations rather than Directives.[2067] In addition, this paragraph will not consider the use of the OMC, even though

[2067] See previously par. 10.7. In addition, the question arises whether a Regulation would provide more clarity on the obligation of judges to address unfair terms ex officio and whether judges would be able to rely on previous case law or other sources in order to ensure that they decide cases in a consistent and predictable manner. Possibly, existing national case law already concerns the interpretation of harmonised law, and a Regulation may make clearer that it concerns European law rather than national law, which may prompt the judiciary to reconsider relying on the legislative history of articles 6:231 et seq BW in the

the OMC is less likely to be opposed in the Dutch legal order as the legislator supports regulatory competition, which could benefit Dutch law on several problematic points. However, the legislator has also managed to benefit from comparative law insights without the OMC. Arguably, the use of the OMC is not necessarily successful because of the weaknesses that have become apparent in the use of the OMC, in particular the limited circle of debate. The Dutch legislator has already managed quite well to gather information through limited consultations. This limitation has undermiend the inclusiveness of debate and the representativeness of actors. Rather than limiting debate, the debate should be widened.

This paragraph will follow the order in which the use of additional and alternative techniques was discussed in chapter 8, as well as discuss the potential role of the DCFR. Accordingly, paragraph 11.7.1. will focus on techniques to support the legislative process. Paragraph 11.7.2. will consider the DCFR and paragraph 11.7.3. focus on techniques to support the extent to which blanket clauses can contribute to comprehensibility and paragraph 11.7.4. will turn to the introduction of collective bargaining and paragraph 11.7.5. will end with a conclusion.

11.7.1. Techniques supporting the legislative process

The use of consultations and impact assessments may well contribute to more and better debate in the development of the law on STC's, which in turn may prompt actors to critically reconsider the law on STC's and improve the law where necessary.

A more consistent use of wider and more open consultations on European proposals, as well as the implementation of Directives once proposals have been accepted, could increase the participation of Dutch actors in the debate. More participation is beneficial as especially Dutch stakeholders have rarely directly participated in the debate at the European level. The participation of these actors may increase the chance that relevant insights are not overlooked in the debate at the European level, which should contribute to the responsiveness of the law.

Notably, this does require that parties do not provide brief responses, but participate in debate and respond to one another's comments, which currently does not seem to be the case in the European democratic process. Moreover, wider consultations may also contribute to the accessibility of the law.

The use of consultations may be supported by the improved use of impact assessments from the European level. In particular, the improved use of impact assessments entail that proposals from the Commission would be critically considered, asking whether there is a need for harmonisation and reform, whether the measure suggested is the most suitable way of dealing with problems for the internal market or consumer protection, as well as other European policy aims, or whether other techniques are available that should be used in addition to or instead of proposed measures. The outcome of such criotical impact assessments may be considered with interest as the Dutch legislator is more inclined to leave room for bottom-up techniques. This general inclination may also be a reason for Dutch actors to prefer introducing a less far-going option first, before turning to harmonisation. The improved use of impact assessments may also lead to more carefully considered choices for a particular combination of techniques.

Also, the use of impact assessments at the national level, possibly based on European consultations and impact assessments, may be more successful than in the

interpretation of these provisions. Moreover, a Regulation may prompt the Hoge Raad to adopt a more active approach towards the harmonised interpretation of the law, especially if sufficient information on foreign decisions are available,

German legal order. The Dutch legal order is not unfamiliar with empirical legal research that support or weaken debate in Parliament.[2068] Notably, however, the Commission need not necessarily take additional impact assessments into account. The development of national impact assessments may also draw more attention to the use of techniques and the effect of the use of techniques at the European level on the development of national private law.

The improved use of networks and databases may further support more thorough debate, by establishing more contacts between actors from different legal orders and between actors from different levels.[2069] This may encourage European actors to take note of discussions in national law. It may also encourage national actors to participate in European debate.

Rather than developing additional networks, European actors should make use of well-established national networks and databases, as these networks and databases already have a considerable pool of expertise and experience and developing additional networks may make it more difficult to keep track of relevant initiatives and contacts.

The improved use of databases, and the increased availability of foreign law decisions and relevant international materials might be more successful in the Dutch than in the German legal order as Dutch courts are less opposed to foreign insights. The confusion of lower courts in international cases however demonstrates an increased need for guidance and direction. Thus, networks and databases should not unlimitedly make new materials available – rather, structuring this information and making relevant decisions more eaily available.

The improved use of databases could be strengthened by a more consistent approach of the Hoge Raad to the use of foreign, European and international materials and take a more active approach in developing guidelines to lower courts.

Dutch actors may seek to make their legal system more accessible to foreign actors through the improved use of databases.[2070] Especially for legal orders that use a language that is not easily accessible to all foreign actors, such as the Dutch legal orders, this may contribute to accessibility.

If Dutch actors do not provide comparative insights in their legal system, pessimistically, this may limit the accessibility of Dutch law to foreign parties to the Belgian and optimistically some German, Swiss, and Austrian actors. Generally, however, potential inaccessibility may also be mitigated by the Centre of International Legal Cooperation (CILC)), a Dutch non-profit organisation supported by Dutch legal experts and practitioners that cooperates with foreign states in the development of private law.[2071]

Thus, the improved use of consultations, impact assessments, networks and databases may contribute to more and better interaction between actors.

[2068] Legal sociological research on STC's includes Gras, *Standaardcontracten, een rechtssociologische analyse*, 1979.
[2069] Currently, for example, the Dutch Consumentenautoriteit is already involved in the International Consumer Protection and Enforcement Network (ICPEN), which in turn participates in the European Justice Forum (see http://europeanjusticeforum.org/faq/key-players/international-consumer-protection-and-enforcement-network.html), and participates with the OECD (see http://www.icpen.org/about.htm).
[2070] R. Zimmerman,'The Principles of European Contract law Contemporary manifestation of the old, and possible foundation for a new, European scholarship of private law', in: F. Faust, G. Thüsing (eds.), *Beyond borders: perspectives on international and comparative law*, Carl Heymanns Verlag, p. 145 points to the commentary of D. Busch et al, (eds.) *The Principles of European Contract Law and Dutch law: A Commentary*, 2002.
[2071] See for an overview of activities http://www.cilc.nl/?q=node/16. See also J.M Smits, 'Import and export of legal models: The Dutch experience', *Transnational Law & Contemporary Problems* 2003, p. 551-574.

11.7.2. The development of the DCFR

Have actors adequately taken into account interdependence and interacted accordingly, and how has that affected the predictability, accessibility, consistency and responsiveness of the law on STC's.

The previous chapter has argued that the DCFR diverges from the private law *acquis* and other soft laws in various respects, without clear or convincing justification for these divergences. This chapter will briefly discuss the differences of the DCFR from the *acquis* and other soft laws in paragraph 11.7.2.1. Paragraph 11.7.2.2. will consider the extent to which national experiences with the implementation of the *acquis* are reflected in the DCFR. Paragraph 11.7.2.3. will end with some concluding remarks.

11.7.2.1. Divergences between the DCFR, the *acquis*, and other soft laws.

The previous chapter has pointed to several differences and similarities:

- the DCFR diverges from the *acquis* in several respects: in the definition of unfairness, the main terms of the contract, and the rule that an intransparent clause for that reason alone may be unfair. In these cases, the DCFR has – rightly so – not been followed.

- In some cases, in particular with regard to the rules on making STC's adequately available, rules should be included in the CESL, as is also the case under the DCFR.

A model rule might have been especially valuable for the Dutch legal order, considering the implementation of Directive 2000/31 and Directive 2006/123. Unfortunately, the DCFR also does not consider the question whether STC's have been made sufficiently available if they have been deposited at courts or trade registers**.**

Dutch authors have pointed out that inconsistencies can also be seen in the *acquis* which could and should have been addressed by the DCFR. Knigge[2072] has pointed to inconsistencies between Brussels I and the Directive, not only with regard to the fairness of jurisdiction clauses and article 23 Brussels I, but also with regard to the *ex officio* obligation and article 24 Brussels I. Moreover, questions on jurisdiction may arise after the implementation of Directive 2013/11 on ADR. Article 13 requires traders to inform consumers of the ADR systems that the trader complies with, which seems to entail that if a dispute arises and parties turn to ADR, the consumer will have to make use of the ADR system of the trader, which can be a foreign ADR system. The trader, in turn, is not obliged or encouraged to take notice of, or participate in, foreign ADR systems. Even if Regulation Brussel I is not applicable to ADR disputes that take the form of arbitration,[2073] this solution does not seem consistent with the protection of consumers in Brussels I.

The DCFR does pay specific attention to jurisdiction clauses. Article II – 9: 409 on jurisdiction clauses provides that jurisdiction clauses are unfair if the clause is supplied by the business and confers exclusive jurisdiction arising under the contract to the court of the place where the business is domiciled. The Comments indicate that Brussels I concerns the 'procedural admissibility' of a clause, while apparently, the Directive considers the substantial fairness of the clause, considering the drafting of the clause, other provisions in the contract and other relevant circumstances.

Yet the DCFR does not address article 24 Brussels I and further diverges from article 17 Brussels I that sets out circumstances in which a choice for jurisdiction in consumer cases is permitted. Par. 1 sets out that this is the case if the choice is made in an agreement after the conflict has arisen –

[2072] M.W. Knigge, 'Tegenstrijdige Europese regelgeving? De verhouding tussen de EEX-Verordening en de Richtlijn oneerlijke bedingen', *MvV* 2012, p. 95.
[2073] MuchKomm/ZPO – EUGVo/Gottwald (2013), article 1, nr 3. Gottwald, at nr 24, traces the exception to the existence of the New York Convention which made additional rules on arbitration unnecessary, but the same cannot be said of binding advice.

thus, STC's in consumer contracts, concluded before a dispute has arisen, are not permitted under this paragraph. Article 17 par. 2 further provides that a choice that allows the consumer to bring claims before courts other than the courts mentioned in this section, are valid, while par. 3 provides that jurisdiction clauses opting for domestic courts are permitted for domestic contracts, insofar as this is permitted under national law.

Therefore, although the explanation in the DCFR may offer some perspective on the inconsistency between Brussels I and Directive 93/13, it fails to address all relevant points. Yet article 84 sub e proposed CESL also determines that clauses granting exclusive jurisdiction to the place where the trader is domiciled, unless that is also the place where the consumer is domiciled, is always unfair. The question arises whether this rule is in accordance with article 17 Brussels I.

- It has been argued that with regard to the definition of standard contract terms, following the DCFR is problematic and should be reconsidered.

Dutch experiences may however provide a different perspective. The definition of standard terms in article II – 1:109 DCFR seems not particularly problematic, considering the largely similar definition of article 6:231 BW, as well as article 2 sub d of the Regulation proposing a CESL and article 7 of the proposed CESL.

However, the DCFR leaves considerable room for uncertainty. Would a future proposal for a 1993 Directive also refer to multiple contracts, differently from article 30 of the proposed Directive? If this is not the case, do inconsistencies arise between a future CESL and a future reformed Directive? Other inconsistencies include the rules on making STC's adequately available.

Accordingly, the added value of the DCFR in these cases may be questioned as it does not offer a solution for or prompt debate on inconsistent rules, but merely adds another rule. This may limit the extent to which it may play a role for the European legislator and the CJEU, and it may more generally limit the extent to which the DCFR contributes to the accessibility and consistency of the law on STC's.

However, a closer look at recent decisions from the Hoge Raad indicates that differences in overlapping soft laws need not necessarily withhold national courts from referring to these sets of soft law. Rather than clinging to that set of soft law rules, the Hoge Raad, or rather A.-G. Wissink,[2074] has apparently considered the DCFR as an additional possibility to discuss cases. Lower courts have also started to refer to the DCFR, although not in cases with regard on STC's.[2075]

Although the DCFR may therefore still be interesting for courts, the extent to which it contributes to the predictability, consistency and accessibility of the law remains limited.

11.7.2.2. The DCFR and national practice

The DCFR could have increased its added value for Dutch actors by considering the following questions:

- The question whether avoidability of the contract obliges the judiciary to evaluate these clauses *ex officio*, or whether the Directive should be reformed.

[2074] Comp. the conclusion of A.-G. Wissink to HR 11 May 2012, *NJ* 2012, 318 and the conclusion of A.G. Wissink to HR 19 November 2010, *NJ* 2010, 623. Interestingly, A.G. Wissink, in note 9 to his conclusion to HR 16 September 2011, *NJ* 2012, 56, noted that the DCFR did not offer comparative material as it restricted itself, in article III – 3:712 DCFR to general rule son penalty clauses.

[2075] Ktr. 's-Hertogenbosch 24 June 2010, LJN BN0636, Rb. Zutphen 3 November 2010, LJN BQ0980.

The reform of the Directive should make clear that unfair clauses are void, which would clarify this issue much more effectively than simply – but correctly – maintaining that it is not essential to elaborate on the ineffectiveness of a Directive and CJEU case law has made clear that clauses are to be evaluated *ex officio*.[2076]

- The definition of the main terms of the contract

This definition may be valuable because of the emphasis of the Hoge Raad on the legislative history of articles 6:231 et seq BW and the definition of the main terms in insurance contracts.[2077]

- Moreover, as Dutch law is less well-developed than German law, it may be more interesting for the Dutch legislator to look at the DCFR as a possible model. This is especially the case in areas where a consistent approach has not been developed throughout the Union, such as the rules on battle of forms.

Thus, article II – 4:209 DCFR stipulates that parties need to expressly reject the applicability of STC's, not by way of STC's, while article 6:225 par. 3 BW stipulates that referral to the second set of STC's shall not lead to the application of that second set of STC's if the second referral does not expressly reject the applicability of the first set of STC's. Arguably, the rule in the DCFR does not make clear which party needs to expressly reject the STC's of the other party, while Dutch law encourages the first user of STC's to reject the applicability of STC's of other parties, thereby forcing the counterparty to expressly reject these terms. However, Dutch law does not generally provide that the converging terms will be applicable.

Accordingly, the comparative notes remark that the law in this area is unsettled in various Member States,[2078] which may increase the inclination of national actors to consider the DCFR as a possible model for law reform. The added value of the DCFR may however be limited if it does not indicate why it prefers a specific rule or if it does not provide a clear rule. If national law in contrast does elaborately explain why it has opted for a particular solution, national legislators might be more convinced by national law than by the DCFR, which may then act as a starting point for comparing the diverging solutions throughout the Union rather than as an inspiration by itself.

►Thus, the DCFR has failed to take into account national experiences in the implementation of the Directive as well as possible points for reform at the national level, and has thereby limited its added value as a "toolbox" for national actors and European actors in the reform of Directive 93/13 and national law. However, the lack of debate on the divergences between national laws and soft laws have not withheld national actors to ignore the DCFR.

11.7.2.3. Conclusion on the use of the DCFR as an additional technique

In the development of the DCFR, actors have not sufficiently taken into account national law. However, the DCFR does provide a clearly added value by providing specfic rules on STC's. The lack of explanation for the preference for a specific solution has not entailed that national actors have ignored the DCFR, even though it was not followed. Accordingly, more interaction with relevant actors, and more clarity the role of the DCFR and the relation between different sources of law, would have increased the extent to which the DCFR can

[2076] DCFR, Part 1, p. 655,
[2077] HR 23 April 2010, *NJ* 2010, 454, see the conclusion of the A.G. under par. 3.20-3.21, as well as Hof Amsterdam 14 October 2008, *NJF* 2008, 481.
[2078] DCFR, Part I, p. 333.

strengthen the predictability, accessibility, consistency and responsiveness of the law on STC's.

11.7.3. Techniques in addition to blanket clauses

Various techniques have been suggested to improve the extent to which blanket clauses contribute to predictability and consistency, even though blanket clauses do not necessarily aim to increase these benchmarks. Should these techniques be developed or not?

Paragraph 11.7.3.1. will consider the development of comitology, paragraph 11.7.3.2. will discuss the development of guidelines. Paragraph 11.7.3.3. will turn to the prejudicial procedure and paragraph 11.7.3.4. will consider the use of alternative regulation. Paragraph 11.7.3.5. will end with a conclusion.

11.7.3.1. Comitology

The development of comitology, in accordance with article 40 of the proposal for a Directive on consumer rights, will undermine rathern than strengthen the predictability, consistency, accessibility and responsiveness of the law on STC's and should therefore be rejected.

Notably, the proposal to use comitology aimed for a more flexible development of model lists. The WODC report rejected this option, but the Dutch legislator did not follow this advice. The use of comitology may not be unacceptable as such in the Dutch legal order because article 6: 239 BW and previous suggestions[2079] are reminiscent of comitology.

The introduction of comitology in this area may be problematic for the following reasons:

1) The introduction of comitology might undermine the consistency of the law.

If model lists developed through comitology are not indicative but binding, this would oblige the national legislator to implement the model lists. Possibly, the clauses on the European model list could diverge from national default law, which might lead to inconsistencies.

Also, the binding character of the model lists would also make it difficult for the legislator to maintain existing lists, which might limit the extent to which these lists contribute to the predictable interpretation of article 6:233 sub a BW in a manner consistent with national default law.

2) The use of comitology may not necessarily contribute to responsiveness; this depends on the composition of committees.

Typically, experts and practitioners as well as legal servants may take place in comitology committees. Yet this need not include relevant stakeholders. The limited participation and uneven representation in European consultations indicate that the participation of actors with relevant experiences in a representative manner should not be assumed too easily.

Arguably, the possibility that model lists will be developed more one-sidedly in the interest of particular stakeholder groups may increase as relevant stakeholders are not included while representation is also uneven, which is especially undesirable as the clauses in the model lists may subsequently affect national default law.

3) The development of the model lists by a comitology committee could decrease the stable and predictable development of the law on STC's

In particular, comitology could lead to multiple amendments to the model lists, which might not be beneficial for the stable development of the law.[2080] The stable and predictable development of the

[2079] See further previously par. …
[2080] Experiences with involvement of … already demonstrates the risk of rapid developments that undermine stability of the law

model lists may be undermined further if the procedures through which a comitology committee would draft the rules are not sufficiently transparent and accessible.

4) The use of comitology could decrease the accessibility of the law on STC's.

The possibility that the model lists could be subject to multiple changes might prompt the legislator to implement the model lists outside of the codification. However, this would lead to fragmented implementation where the provisions of the Directive would be scattered over multiple laws, which would not benefit the accessibility of the law.

The accessibility of the law on this matter may decrease more generally if it is left to committees that contract parties as well as legal practitioners may not be familiar with, while it is also not clear how parties subject to rules drafted by comitology committees.

►These possible difficulties in the implementation of the model lists under a maximum harmonisation Directive indicates that the introduction of comitology is more compatible with the development of Regulations. However, the development of Regulations and comitology would leave very little room to the national legislator. This possibility may make the introduction of a Regulation combined with comitology less attractive for national state actors. The potential problems of implementation of the model lists make the introduction of comitology an unattractive option.

11.7.3.2. Guidelines

The development of guidelines by the European Commission is not likely to contribute to predictability and consistency, and may inhibit the responsiveness of the law on STC's. Consequently, this option should be rejected.

The development of guidelines at the national level[2081] is similarly not successful.

The guidelines have been criticised. Messer-Dinnissen and Tromp[2082] have held that the working group exceeded its competence, while the guidelines are not representative of a majority view. Moreover, Messer-Dinnissen and Tromp find that the report overlooks that some clauses need not necessarily be unfair and may be too strict in some cases. Koek en Van de Laarschot[2083] however point to the development of succesful guidelines in other areas and the careful process through which these guidelines are developed.

Unfortunately, the guidelines on the *ex officio* evaluation of fairness have not induced courts to consistently decide in accordance with this resport.[2084] The decisions of the Hoge Raad are not easy to reconcile with this report, and this has very likely severely undermined the strength of the guidelines. Thus, national guidelines may likely not contribute to consistency and predictability if the Hoge Raad decides differently.

The following problems become apparent:

1) Guidelines have so far not been successful.

[2081] Availabkle at http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-civiel-recht/Documents/EindrapportLOVCKwerkgroepambtshalvetoetsing_17210.pdf.
[2082] P.E.M. Messer- Dinnissen en J. Tromp, 'Bestuurders van en Raad voor de rechtspraak: houdt het bij raad aan de rechtspraak', *NJB* 2010/1014.
[2083] M. Koek en M. van de Laarschot, 'Kanttekeningen bij een vermeende uitglijer', *NJB* 2010, 1464.
[2084] Comp. Ktr,Rotterdam 4 May 2012, LJN BX4196, Ktr. Alkmaar, 4 July 2011, *LJN* BU2932, Ktr. Alkmaar 22 November 2010, LJN BO7959, Rb. Groningen 31 March 2010, LJN BM1402

Particularly, the development of guidelines for Directive 2005/29 and additional alternatives from the Netherlands Authority for the Financial Markets [2085] are unsuccessful.

2) The development of guidelines will not help the responsive development of the law, for which article 3 Directive was initially inserted in the Directive.

Particularly, will guidelines will be based on national case law, ADR and other relevant insights? It may be doubted whether the Commission is sufficiently familiar with these national sources and insights.

3) The development of guidelines at the European level may not be in accordance with the idea that the law on STC's is also based on common principles of good faith.

If this is the case, it can be doubted whether the Commission can uniformly decide what behaviour is in accordance with good faith; this may also depend on national practice and surrounding national default law.

4) Questions on the status and the content of the guidelines arise.

On the one hand, if guidelines are not binding, the question arises what role they will play in the development of law by the judiciary – the experience with the model list in the Annex to the Directive indicates that national state actors may adopt restraint towards these non-binding measures. On the other hand, if guidelines have a clear binding status and clearly developed rules, they may not be politically feasible as they may limits the room left for national judges to decide in accordance with national practice and national legal views in justic, as reflected by national law.

►Thus, although the use of guidelines has been suggested to improve the predictable and consistent interpretation of national laws implementing article 3 Directive, a preliminary question that should be addressed is to what extent these guidelines will undermine or contribute to the responsive development of the law. Moreover, the extent to which guidelines may contribute to the comprehensibility of the law on STC's depends on the status and content of these guidelines.

11.7.3.3. The prejudicial procedure

The introduction of the prejudicial procedure is likely to contribute to the predictability, and consistency of the law on STC's of questions are referred to the Hoge Raad, if judges make us of this possibility.

The legislator expressly considered the need to prevent inconsistent decisions in the introduction of the prejudicial procedure.[2086] Will the answers to questions on the inclusion, availability and evaluation of STC's also contribute more generally to the development of the law? The inconsistent decisions of lower courts on STC's indicate that referring prejudicial questions might improve the consistency and legal unity of Dutch decisions. However, as lower courts generally do not refer to one another's decisions, they may not be aware of inconsistency and therefore not refer questions to the Hoge Raad. Moreover, neither parties nor judges have consistently shown much interest in elaborately referring to relevant sources, perhaps also because it concerns cases that seem relatively straightforward with a limited financial interest. Van Kampen and Giesen[2087] note that the willingness of judges to ask prejudicial questions may also depend on the line developed by the Hoge Raad in which

[2085] Available at http://www.afm.nl/~/media/files/wetten-regels/leidraad/norm-misleiding.ashx. The case law on article 6: 193b BW does not indicate that the guidance developed in the area of unfair practices have been used.
[2086] *Kamerstukken II*, 2010-2011, 32612, p. 4.
[2087] S.S. van Kampen, I. Giesen, 'Prejudiciële vragen aan de Hoge Raad, valkuilen voor de Hoge Raad', *TCR* 2013, p. 1.

these questions should be asked. Currently, questions on the law on STC's have not yet been referred to the Hoge Raad.[2088]

Also, not all questions will be referred to the Hoge Raad.

Questions will likely not be referred to the Hoge Raad are:

i) Questions on the *ex officio* evaluation of cases, because the Hoge Raad has already indicated restraint towards the *ex officio* evaluation.

ii) Also, questions on the interpretation of clauses.

These questions often concern decisions that are partially also questions of fact, and the wording of article 392 par. 1 Rv indicates that courts can refer questions of law to the Hoge Raad. The legislator has however indicated that this should also include these so-called "mixed" questions of law and fact.[2089]

iii) Decisions of lower courts based on an incorrect understanding of articles 6:236 and 237 BW in relation to article 6:233 BW may not fall within the scope of article 392 Rv.

Other questions such as the question whether judges could and should mitigate penalty clauses in accordance with article 6:94 BW,[2090] or questions whether arbitration clauses in consumer cases are necessarily unfair[2091] may arguably be included.

Prejudicial questions may also be asked if new legislation is introduced.[2092] It may however be doubted whether the implementation of a future reformed Directive lead to prejudicial questions, especially if such implementation does not give rise to considerable amendments. Yet if the reform of the 1993 Directive on unfair terms results in a maximum harmonisation Directive, this may well affect the interpretation of article 6:233 sub a BW, even though this will need not result in a change in the wording of article 6:233 sub a BW. In particular, the question whether and if so, to what extent the CJEU is competent to interpret the successor to current article 3 Directive may arise.

Will the prejudicial procedure lead to more CJEU decisions? This will not necessarily be the case as the possibility to refer questions to the Hoge Raad does not automatically mean that the Hoge Raad, in turn, will refer questions that have been referred to it to the CJEU. Perhaps, such referral is not in accordance with the aim of the legislator to establish a relatively quick procedure to determine questions of law.

Thus, the prejudicial procedure may well improve the predictability and consistency of the law on STC's, if judges decide to refer questions to the Hoge Raad.

11.7.3.4. Alternative regulation

If courts refer to alternative regulation, this will likely contribute to the responsiveness of the law to national practices and parties' views in justice.

Self-regulation may contribute to the comprehensibility of the law on STC's in various ways:

1) Judges may take into account that STC's in consumer contracts have been collectively negotiated in their evaluation of the STC's under article 6: 233 sub a BW.

Some decisions of lower courts, as well as ADR, already indicate that this is a circumstance that may be taken into account.[2093] This need not necessarily mean that judges should generally uphold

[2088] Currently Rb. Amsterdam 4 December 2012, LJN BY6220 and Rb. 3 August 2012, *NJ* 2012, 663.
[2089] *Kamerstukken II*, 2010-2011, 32612, p. 10.
[2090] HR 24 March 2006, *NJ* 2007, 115.
[2091] HR 21 September 2012, *RvdW* 2012, 1132.
[2092] *Kamerstukken II*, 2010-2011, 32612, nr 3, p. 4.
[2093] For more restraint see Rb. Amsterdam 24 March 2010, *TvA* 2011, 27. Other courts have taken the collective ngotiations into account: see for example Hof 's-Hertogenbosch 9 August 2011, LJN BR6638, Rb. Arnhem 30 december 2009, *RCR* 2010, 26,

collectively negotiated STC's – however, it is a relevant perspective and in accordance with predictability to enable users that have collectively negotiated STC's to rely on them. Yet it is also necessary to evaluate these clauses, if only because consumers subjected to these STCs have not had the same opportunity to affect these clauses. Also, the evaluation of article 6:233 sub a BW is an individual assessment that should take relevant individual circumstances into account.

2) Judges may take into account codes of conduct that contradict clauses in the STC's.

This would also be in line with article 6 Directive 2005/29, and if consumers have relied on codes in entering into contracts, consumers could arguably justifiably have done so, in line with article 3:35 BW. It is not clear to what extent users of STC's actually do so, and whether courts would not already consider provisions in codes of conduct, in accordance with article 6 Directive 2005/29.

Thus, courts have already recognised the added value of alternative regulation in the interpretation of blanket clauses.

11.7.3.5. Conclusion on the use of techniques in addition to blanket clauses

The extent to which article 6:233 sub a BW contributes to the predictability and consistency of the law has been severely undermined by the lack of interaction between courts. Particularly, the development of the prejudicial procedure and a more consistent use of alternative regulation in the interpretation may contribute to predictability and consistency. The use of alternative regulation also strengthens the responsive development of the law on STC's.

11.7.4. The development of collective negotiations

It is not clear whether the development of collective negotiations on STC's at the transnational level will contribute to predictability and the responsiveness of the law on STC's.

There have been suggestions in Dutch literature to transpose the successful collective negotiations on STC's to the European level. This would increase the extent to which users of STC's take into account the interests of consumers while it would also facilitate transnational trade.[2094]

Transposing this model to the European level would entail the development of a European organisation as an equivalent to the SER, in particular an equivalent to the CCA. It can be doubted to what extent current European institutions such as the European Economic and Social Council, currently provide a platform, and whether stakeholder groups are sufficiently organised and willing to develop collectively negotiated STC's at the European level. The question arises whether these stakeholder groups would represent national stakeholder groups throughout the Union, or whether it would be "European" stakeholder groups selected by the Commission.

However, collective negotiations still leave room for differences that may inhibit trade. If collective negotiations result in European STC's, they might still be interpreted differently throughout the Union. Additional difficulties would arise if STC's would be able to set aside consumer protection laws throughout the Union. Introducing three-quarter mandatory law would provide a solution. It is however not clear whether there is political support for this form

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Ktr. 's-Gravenhage 5 August 2009, *NJF* 2009, 460, Hof ';s-Hertogenbosch 5 August 2003, comp. also Hof 's-Hertogenbosch 10 January 2006, *NJF* 2006, 261, for STC's agreed between an energy company and a small company, and differently Rb. Arnhem 5 November 2008,LJN BG4492.

[2094] A.G. Castermans, 'Towards a European contract law through social dialogue', *ERCL* 2011, p. 366.

of mandatory law and collectively negotiated STC's would still be subject to judicial evaluation.

It has been suggested that organisations from different Member States where parties are familiar with collective negotiations, such as The Netherlands and Germany, may develop cross-border collective negotiations.

However, the success of this option depends on the capability and the willingness of private actors. Currently, it has not become apparent that there is much cooperation across borders between different stakeholder organisations, which would however be necessary. This depends on the capability and the willingness of private actors. The desirability and feasibility of this option further depends on the equal positions of parties and representativeness of parties and the inclusiveness of the process, which should be evaluated at the national level.

Thus, although cross-border collective negotiaitons would be an interesting development that could increase the responsive and predictable development of the law on STC's in cross-border trade, it need not necessarily be successful as clauses would still be evaluated differently in the Dutch and German legal order and the willingness and capacity of parties to enter into collective negotiations should also not be presumed.

11.7.5. Conclusion on the use of additional and alternative techniques

What techniques in addition to or instead of currently used techniques are likely to contribute to the predictability, accessibility, consistency and responsiveness of the law on STC's?

Techniques that may be successful are the improved use of consultations, impact assessments, databases and networks, as well as the use of alternative regulation in the evaluation of blanket clauses. Moreover, techniques discussed in the previous chapter, in particular the study of the use of STC's, may also be beneficial.

In contrast, the development of comitology procedures and the development of guidelines will be detrimental for the predictable, consistent, accessible and responsive development of the law on STC's through blanket clauses.

It is not clear whether the development of collective bargaining and the development of the prejudicial procedure and also the success of a future CESL will contribute to the comprehensibility of the law on STC's, as this depends on the initiative of private parties and lower courts that are difficult to predict.

The various suggestions for additional techniques may well overlap and reinforce one another. Particularly, the improved use of databases and networks may well support the improved use of consultations.

As actors have preferred a hierarchical approach without combining top-down techniques with bottom-up techniques that have usually accompanied these top-down techniques, the suggestions in this chapter imply a shift towards a more bottom-up approach. As impact assessments become more critical, however,the possibility of developing bottom-up techniques before developing more top-down alternatives may be considered. However, the success of these options, and the success of bottom-up techniques in addition to top-down techniques, remain dependant on the participation of non-state actors. However, parties in the area of STC's have shown considerable initiative.

11.8. Conclusion

Dutch law is not considered as a clear success, but nor has it been described as a failure. Dutch actors have not considered the decreased ability of national techniques to ensure the comprehensibility of the law as such, and have accordingly not sufficiently interacted with relevant actors. Although the shortcomings that have become apparent cannot be attributed to this approach, they have been aggravated by a lack of sufficient interaction that failed to prompt the legislator and the courts to deal with problems of the newly established law that have since become visible in legal practice.

That does not mean that actors in the Dutch legal order have not interacted at all; to the contrary, Dutch courts have shown less restraint in interacting with international and foreign actors in deciding cases under international regimes than German courts. Also, the legislator has carefully made use of insights of successful German law and considered the development of separate laws to implement the *acquis*. The approach of the Dutch legislator in the implementation of the *acquis* seems more predictable than the strategy of the German legislator, who has not consistently implemented the private law *acquis* within the BGB. Instead, the German legislator has based its approach on the question whether a new Directive is *Sonderprivatrecht*, and it is not easily apparent why some Directives can be more easily characterised as *Sonderprivatrecht* than other Directives. In contrast, the Dutch legislator has not based its approach on the characterisation of Directives as “special”, nor has the stable and consistent development of private law been considered in so many words. Also, the implementation of multiple Directives in articles 6:231 et seq BW, the scope of which was subsequently expanded, has led to problems that are not visible in German law. The place of the implementation of Directive 93/13, however, followed from the new structure of the BW, whereas the structure of the BGB may indicate a more fragmented approach, which may also make the accessible implementation of the *acquis* more challenging for the German legislator.

Like German actors, the Dutch legislator and courts have shown restraint in implementing the *acquis*. However, despite the similarity in these approaches, the Dutch approach is not as successful as the German approach. Can the problems apparent in Dutch law then be traced to a lack of interaction?

Notably, Dutch actors have not as actively participated in debate at the European level, nor has the implementation of Directives been discussed in much detail. Because of the lack of interaction, actors have failed to critically consider national law on STC’s, and respond to problems that have become visible. Also, the interaction between Dutch courts has been much too limited, which has undermined consistency and predictability, and the promotion of regulatory competition in this area by the Dutch legislator.

Arguably, the aggravation of problems can be traced to these shortcomings.

Thus, the coexistence of actors in the development of the law on STC’s has given rise to problems for private parties. However, the problem is not only the coexistence of actors but the defective implementation of Directives and the restraint of both national and European actors in signalling problems in the *acquis* which subsequently have to be implemented and re-implemented in national law.

Moreover, in the long term, the restraint of the courts and non-state actors in interacting with European actors may undermine the predictable, consistent, accessible and responsive development of the *acquis*.

However, the coexistence of actors has not consistently been detrimental. Instances where more interaction has benefitted the law on STC’s include the reform of articles 6:236

and 237 BW and more generally the drafting of legislation, both in the codification and the drafting of new initiatives such as the Dutch prejudicial procedure. Both the German and Dutch legislator have carefully taken into account the needs and preferences of legal practice, which may improve the responsiveness of the law on STC's.

Moreover, coexistence may benefit the law on STC's if national actors and European actors prompt one another to reconsider defective rules, which is currently however not visible.

The problems accentuate the diminished ability of national actors to ensure the predictability, accessibility, consistency and responsiveness of the law through the development of national techniques. As actors have not recognised interdependence, moreover, the use of additional and alternative techniques that may mitigate problems have not been considered. However, because there is more room for experimentation in the Dutch legal order than in the German legal order, there are also more possibilities to compensate for shortcomings and solve problems. Simultaneously, it has been argued that a framework to assess the role of especially non-state actors and the development of alternative regulation should be developed, and concepts of private autonomy and *Fremdbestimmung* that may impose limitations on such experiments and thereby, perhaps, limit the extent to which new techniques can contribute to the comprehensibilty of private law in addition to national techniques.

The changes suggested in this chapter are not only long term changes. Courts should adopt a more active approach and the law on the availability of STC's, especially in international cases, and the rules on unduly surprising clauses should be reconsidered.

Chapter 12: Generalisation

This book has considered the role of actors in the development of European private law in the German and Dutch legal order and the use of national techniques in the development of European private law, as well as the use of techniques in addition or instead of national techniques. What conclusions can be drawn from the findings in the case studies that are more generally valid for the development of European private law?

Paragraph 12.1. will consider the role of actors and the interdependence between actors that has become visible in chapters 4 and 5 in the light of the findings in the previous chapters. Paragraph 12.2. will consider the use of national techniques in the development of European private law in the light of the previous chapters. Paragraph 12.3. will turn to the use of techniques in addition or instead of currently used techniques. Paragraph 12.4. will end with a conclusion.

12.1. The roles of actors

Chapters 4 and 5 already indicated that interdependence had developed between actors. This was particularly visible in the German legal order. Under the GG, national, not European, state actors continue to play a central role. With regard to non-state actors, German concerns on private autonomy and *Fremdbestimmung* clashed with the more pragmatic European approach that enabled non-state actors to circumvent limitations imposed on them by German actors.

Chapter 4 and 5 both surmised that if interdependence became apparent, this might make it more complicated for actors to develop European private law in accordance with benchmarks of predictability, accessibility, consistency, and responsiveness, while it may also make it more complicated for actors to adequately identify the actor most suited or responsible for the development of European private law in accordance with these benchmarks.

Notably, the case study has made apparent that non-state actors may play an important role. Non-state actors may pressure for law reform, or alternative regulation may play a role in courts' decisions. However, the extent to which this happens still depends on state actors' willingness to take non-state actors initiatives into account, and forms of alternative regulation successful (such as the VOB) or accepted (such as article 6: 239 BW) in one legal order, may be unsuccessful or unacceptable in other legal orders. State actors may be especially inclined to do so if non-state actors provide rules in highly complex areas or if they adequately reflect legitimate needs in (international) practice. Yet even though legislators generally find the attractiveness of their laws to international actors important, this need not necessarily lead to regulatory competition.

Not only actors at different levels become more dependant on one another, national legislators and courts also become increasingly interdependent.

The problems that arise from the approach of the courts draw attention to the increased interdependence between legislators and courts in a multilevel legal order. As more obligations are placed on national actors to amend the law in accordance with European measures, the obligations of courts to correctly interpret the law and ensure the predictable, consistent and responsive development of the law also increases.

This increased interdependence is also visible in intiatives for regulatory competition. The approach of courts can compensate a legislator's refusal to engage in regulatory competition that may end in a race to the bottom, as is the case in the German legal order, but the approach of courts may also undermine efforts for regulatory competition, as is the case in the Dutch legal order.

Chapter 4 made clear that **the roles of actors under the German framework clashed with the roles of actors under European law. However, German actors have managed quite well to maintain the predictability, consistency, accessibility and responsiveness of the law on STC's**. Typically, German actors have emphasised the success of the law on STC's and sought to maintain this successful regime. However, problems have become apparent with regard to the role of respectively the BGH and the Hoge Raad. Both the BGH and the Hoge Raad have maintained their competence to interpret, respectively, article 307 BGB and article 6:233 sub a BW, despite CJEU case law indicating differently. The ability of both the BGH and the Hoge Raad to do so is limited as lower couts may refer questions to the CJEU undermining the approach of the Hoge Raad. Lower courts have also followed the CJEU rather than the Hoge Raad. Notably, German lower courts more consistently follow the BGH, which may mean that the BGH may have slightly more room to set out a course diverging from CJEU case law.

Thus, despite more contrasts between the role of actors under the German framework and under European law, problems for private parties have not become directly apparent. Notably, the limitation on non-state actors roles in the development of STC's has been followed by the European legislator. The active participation of German actors might have helped limit or prevent conflict. Possibly, however, conflicts may arise of a revised Directive on unfair contract terms limits the evaluation of clauses by the judiciary. However, even though conflict has not become directly apparent, the lack of interaction between German and European actors has made it less likely that shortcomings in the private law *acquis* will be remedied.

Nevertheless, especially in the German legal order, actors have adopted a defensive approach to preserve the high quality of the law on STC's, which may limit problems that may arise form interdependence. Accordingly, in the implementation of Directives, both legislators and judiciaries have adopted restraint.[2095] This minimalist approach is visible more broadly with regard to the implementation of the private law *acquis*.[2096] It has been argued that this restraint, including the restraint with regard to foreign decisions, contributes to 'nationalisation' of international regimes.[2097]

Possibly, in other areas, where German law has been less successfully developed, clashes may become more visible as German actors are less able to rely on a successull regime. The Dutch experience indicates that in these cases, a defensive approach might well undermine the quality of private law. On the other hand, if this is the case, theoretically, German actors may also adopt a less defensive approach. Regardless, European actors might not be inclined to develop a more tolerant approach to national divergences, which might provoke resistance at the national level.

[2095] Interestingly, courts in other Member States have also shown restraint in referring cases to the CJEU, see M. Kenny, 'The Law Commissions' 2012 Issues Paper on unfair terms: subverting the system of "Europeanized" private law?', *ERPL* 2013, p. 880.
[2096] N. Reich, 'The implementation of Directive 93/13/EEC on unfair terms in consumer contracts in Germany', *ERPL* 1997, p. 172
[2097] J. Basedow, 'Der BGH, seine Rechtsanwälte und die Verantwortung für das europäische Privatrecht', in: FS Brandner, 1996, p. 655.

Interestingly, even though interdependence between Dutch and European actors is less outspoken as there are less conflicts on the role of actors, problems in terms of unpredictability and inconsistency have become visible in the Dutch law on STC's. Problems arose from the unwillingness to immediately adapt newly established law and the conviction that BW is successfull. This means that the defensive approach from Dutch actors is only likely to be reconsidered if shortcomings in private law are very clear, and if harmonisation is likely to improve these shortcomings, or if European proposals are in line with national preferences. In other Member States, a more critical view on national law has been developed, andt there has been more emphasis on the need to amend the law.[2098] The findings in chapters 10 and 11 indicate that **harmonisation initiatives in areas that are considered successful, or not in need of improvement, may meet with a defensive approach from national actors**. Yet in some of these areas, European initiatives have nevertheless become visible.[2099]

A limited approach is also visible at the European level. **The approaches of European and national actors may unfortunately reinforce one another**, which may further decrease the chance that the reform of the *acquis* will take into account relevant insights.

At the national level, this defensive approach should be reconsidered as it does not exactly discourage the European legislator or convince European actors that the unwillingness of national actors is not merely based on a preference for the status quo. Accordingly, even if a proposal closely resembles a national regime, national legislators should not adopt a minimum implementation approach, but make more effort to justify why national law is already in accordance with a Directive. A less defensive approach also means that harmonisation initiatives should prompt national legislators to critically consider the need for legislative changes, also if an apparently successful system has been established. Thus, the coexistence of actors could be used as a starting point to consider the development of the law in a way that benefits from the insights of multiple actors, especially if national law shows defects. **Rejection based on a clear assessment of the disadvantages of a particular proposal, alongside alternative suggestions, or more detailed arguments setting out why harmonisation is undesirable are more likely to have effect.**

European actors should equally recognise the relevance of national views. Accordingly, the emphasis of the European legislator on the shortcomings of minimum harmonisation and the corresponding preference for maximum harmonisaiton should be reconsidered. These suggestions overlook the restraint of national actors in the application of national law implementing Directives. As Directives harmonise fragmented parts of private law, and as judges frequently do not refer questions to the CJEU and foreign decisions, the extent to which maximum harmonisation as such will strengthen the predictable and consistent interpretation of blanket clauses in the *acquis* may also be doubted.

A less defensive approach of both national and European actors would also entail that both European and national actors carefully consider techniques that could be used to improve the functioning of the internal market, and take into account the combination of techniques. Rather than trying out techniques and subsequently abandoning them, a more consistent, and stable use of techniques would be developed as a

[2098] Comp. the initiative in the UK to reform the law on unfair contract terms, see particularly the Law Commissions, 2012 Issues paper, Unfair terms in consumer contracts: A new approach, 25 July 2012, http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_issues.pdf.
[2099] COM (2011) 142.

result. In turn, more stability and consistency in the use of techniques could also make the development of the private law *acquis* a bit less unpredictable.

Both state-actors and non-state actors' preference for a hierarchical approach should be considered, though this may depend on the area subject to harmonisation. Possible approaches can be evaluated more broadly if impact assessments are improved. This however also presupposes that actors would consider these impact assessments.

12.2. The use of national techniques

The findings in these case studies also provide more general conclusions for the development of European private law through national techniques:

1) The development of private law through codifications is not based on notions of interdependence.

Neither the Dutch nor the German legislator has developed a consistent, predictable approach to the implementation of Directives in codifications. The distinction between general private law and *Sonderprivatrecht* has not convincingly served as a starting point that allows for a predictable implementation of Directives.

2) The development of the law through blanket clauses may also affect the way in which private law is developed through codifications.

Even though the wide use of blanket clauses have been considered more critically in the German legal order,[2100] German courts have consistently adopted a more active approach, even in the absence of a specific blanket clause to assess STC's, than Dutch courts. The more active approach of German courts is in line with the more prominent role that German judges may play in development of the law,[2101] particularly their role in the development of the law on STC's. In contrast, Dutch courts have exercised restraint, perhaps also because it concerned a new blanket clause. Problems of inconsistency in the Dutch legal order indicate that blanket clauses such as article 6:233 sub a BW presuppose an active role of courts to maintain consistency and predictability.[2102]

If Dutch courts adopt similar restraint in the interpretation of blanket clauses, the legislator needs to adopt a more active approach in amending the law in accordance with society's legal views on justice and the needs of businesses. Thus, **general restraint of the courts would render the use of blanket clauses a less suitable technique to provide for flexibility in codes. This may also mean that the extent to which codifications can act as a barrier to too much enthusiasm from the legislator may become limited**.[2103] However, even though Dutch lower courts have not made it a habit to refer to the decisions of other lower courts, the restraint of Dutch courts to article 6:233 sub a BW is not representative of the more general approach of Dutch courts towards developing private law.

[2100] Especially U. Diederichsen, *Die Flucht des Gesetzgebers aus der politischen Verantwortung im Zivilrecht*, Müller : Karlsruhe 1974, p. 29. In contrast, the use of blanket clauses in the Dutch legal order has generally received support, see especially T. Koopmans, 'Lof der onbestemdheid', *RM Themis* 1991, p. 209. See more critically J.M. Barendrecht, *Recht als model van rechtsvaardigheid*, Kluwer: Deventer 1992.

[2101] See previously par. 6.3.1.

[2102] Yet interestingly, decisions from courts in other Member States where precedent has played a more prominent role in general, have also been criticised, although the lack of consistency in the *acquis* and initiatives at the national level for reform have been emphasised in this respect. See M. Kenny, 'The Law Commissions' 2012 Issues Paper on unfair terms: subverting the system of "Europeanized" private law?', *ERPL* 2013, p. 881.

[2103] J.M. Smits, *Omstreden rechtswetenschap. Over aard, methode en organisatie van juridische discipline*, BJU: The Hague 2009, p. 129.

Yet importantly, **the findings in the case study on the approach of courts may be representative of the approach of courts towards the application of national law implementing consumer contract law Directives and European law more generally**.[2104] The decisions of Dutch lower courts in the evaluation of clauses in consumer contracts may be more generally relevant for the development of the consumer contract law *acquis*. The inconsistent decisions indicate that Dutch lower courts, in these small cases, may well be less likely to extensively refer to other decisions, let alone foreign and CJEU decisions, and international materials, and the need for an active approach of the Hoge Raad in these cases has become apparent. However, simultaneously, it has become clear that in some cases, especially Dutch courts follow CJEU decisions rather than national decisions.

Similar reasons may motivate the equally visible restraint of the German judiciary in cases falling within the scope of especially the consumer law *acquis* with regard to foreign decisions and the CJEU.[2105] Notably, courts may, rightly so, prioritise a quick and just way – in accordance with standards of predictability, consistency, accessibility and responsiveness – to decide cases. In consumer cases, little financial interests may be at stake, and referring to foreign decisions or referring questions to the CJEU may not be in proportion to a relatively straightforward case. The criticism of CJEU decisions may also induce the judge to adopt restraint.[2106] Especially in the German legal order, an abundance of German materials is available.

The findings in the Dutch case study indicate that the development of the BW has not prompted restraint in amending the law – indeed, in the drafting of the codification, Meijers indicated that revision every ten years or so would be necessary. The shortcomings visible in the law on STC's confirm that conclusion.

However, general restraint on the development of legislation on new topics may also be a disadvantage, as it may reduce the willingness of the European legislator to await the developments of national laws on "new" topics.

Within the Union, **it is unfortunate that reasons for codification, and the extent to which codifications can realistically achieve the aims that they are expected to achieve, are not carefully reconsidered**. Shortcomings in the legislative process may further undermine the use of codifications.

3) It is difficult to determine to what extent general principles underlying national law converge with the *acquis*, if general principles can be found to underpin the *acquis* at all. This may diminish the extent to which general principles can function as a starting point for interaction between actors developing private law.

The Dutch case study made clear that considerations in line with the *Richtigkeitsgewähr* played a role in the revision of national law affecting the law on STC's. [2107] Nevertheless, the subsequent amendments demonstrate that this does not necessarily mean that Dutch law

[2104] See previously par. 8.2.5.
[2105] B. Hess, 'Rechtsfragen des Vorabentscheidungsverfahrens', *RabelsZ* 2002, p. 479 notes that the restraint of the BGH is especially visible in the law on STC's, but also notes this inclination more widely, pointing out that the decision of the BVerfG 9 January 2001, *NJW* 2001,1267 may not lead to a different approach. He contrasts this restraint, however, with the approach of courts in civil procedure law. Interestingly, Dutch courts have also referred questions to the CJEU on matters of private international law, although M.V. Polak, 'Verwijzen is zilver, zwijgen is goud?', in: A.G. Castermans et al (eds.), *Het zwijgen van de Hoge Raad, BWKJ 25*, Kluwer: Deventer 2009, p. 89 also notes that some restraint is visible in the decisions of the Hoge Raad.
[2106] B. Hess, 'Rechtsfragen des Vorabentscheidungsverfahrens', *RabelsZ* 2002, p.478.
[2107] See 11.5.1.

and German law will increasingly converge. Particularly, the view when a party is in a such a weak bargaining position that it justifies the development of mandatory law may differ. Therefore, even if general principles underlying the German and Dutch law on STC's, as well as Directive 93/13, converge – which is not clear – and even if interaction develops, actors might still disagree on the future development of the law.

12.3. The use of techniques in addition to or instead of national techniques

1) There is no ideal combination of techniques, even for one area of law.

The law on STC's cannot be considered in isolation from other areas of law, including more general contract law, but also more specific parts of consumer contract law. Moreover, even if there was an ideal combination of techniques, the perfect combination also depends on the level of internationalisation, Euroepan integration, as well as the role of non-state actors and the existence of regulation, which may well change over time.

However, studying the law on STC's has made clear that some additional or alternative techniques, in particular the use of Regulations instead of Directives, as well as the OMC, are not likely to be adopted, regardless of their benefits and detriments at an abstract level.

2) The suitability of additional and alternative techniques not only depends on the area of law, but also on the characteristics of legal orders.

The approach of legislators to the implementation of the *acquis* depends on the way that national private law has developed. This also affects the choice for and suitability of additional and alternative techniques. Moreover, the appropriateness of techniques may depend on the role of actors in legal order.

This does not mean that parties cannot look at the use of additional or alternative techniques in other legal orders. The use of impact assessments in the English legal order, the use of collective bargaining in the Dutch legal order and the use of lower regulation in the implementation of the *acquis* in the German legal order may serve as sources of inspiration for actors in other legal orders. Some initiatives that are unsuccessful in one legal order, may moreover be interesting for other legal order, as becomes clear from article 6:214 BW. The lack of success of this provision can be explained by the success of overlapping self-regulation. In legal orders where similarly successful self-regulation is absent, initiatives such as article 6:214 BW may well be less unsuccessful, especially in legal orders where a need for more flexibility has been expressed, but where little self-regulation has developed, or where objections against self-regulation exist.

3) Shortcomings in the legislative process affect the extent to which codifications and blanket clauses ensure the predictability, consistency, accessibility and responsiveness of the law.

Particularly, the shortcomings in the consultations and impact assessments have been more generally visible. In the Dutch legal order, moreover, the interaction between the government and Parliament has been criticised more generally, as the negotiation processes at the national and the European level are separated and insufficiently coordinated; once proposals have been negotiated at the European Parliament, they are discussed in Parliament, with the

exception of more fundamental matters.[2108] National democratic scrutiny seems to be better organised in Germany, as well as other Member States.[2109]

4) **Because the DCFR does not consider national experiences in the implementation of the *acquis*, it is not well suited to remedy problems encountered at the national level, which decreases its value as a toolbox for both national and European actors.**

5) **The DCFR does provide a clear added value compared with other sets of soft laws as it contains specific rules on STC's. In cases of overlap, differences from other sets of soft law that are not clearly explained have not stopped national actors from referring to the DCFR.**

However, the case study has made clear that the approach of Dutch and German courts differs considerably with regard to soft law. Whereas decisions in which German courts have referred to the DCFR or other sets of soft law have not become apparent, Dutch courts seem more inclined to do so. Thus, possibly, the willingness of courts and practitioners to refer to soft law may differ throughout the Union, notwithstanding the added value, or lack thereof, of the DCFR and other sets of soft laws. Possibly, the lack of referral in German courts may be traced to the well-developed law on STC's; perhaps, German courts are more likely to refer to soft law if they are faced with lacunae.

The transformation of soft law into hard law may also prompt national actors to consider soft laws more carefully, regardless of their divergence with other sets of soft law. Yet in these cases, divergence between preceding sets of soft law may provide actors with less starting point to assess their legal position under, for example, a future CESL.

12.4. Conclusion

The changing roles of actors and the interdependence between actors should be taken into account in the development of European private law. Not only interdependence between European and national state actors, but also between courts and legislators, and between state and non-state actors should be considered.

The extent to which this occurs may depend on various circumstances and the area of law concerned – particularly the existence of well-established or newly established national law may affect the willingness of actors to participate. Also, the priority of national actors to safeguard the quality of national private law may play a role.

[2108] W. Voermans, 'De Nederlandse wetgever in de communautaire toekomst', in: P. Koorn, L.H.M. Loeber (eds.), *De betekenis van de Europese Conventie voor de wetgevingspraktijk, Preadviezen voor de Vereniging voor wetgeving en wetgevingsbeleid*, SDU: The Hague 2004, p. 84-85.

[2109] In particular the United Kingdom, where the European Scrutiny Committee scrutinieses European proposals; see for a wider comparison B. van Mourik, *Parlementaire controle op Europese besluitvorming. Een rechtsvergelijkend onderzoek naar mandaatsystemen en parlementaire behandelingsvoorbehouden*, Wolf Legal Publishers: Nijmegen 2012.

Chapter 13: Conclusions

13.1. Introduction

This volume has asked to what extent the coexistence of actors in the development of European private law is beneficial or problematic. The book has been inspired by debate on multilevel governance that emphasises the coexistence of actors. Two differences are especially important for the development of private law:

1) The increasing importance of non-state actors.[2110]

The development of private law more and more involves cross-border matters and requires more expertise and organisational resources that state actors may not possess. In addition, the increasing development of alternative regulation presupposes the involvement of private actors.

2) The involvement of multiple state actors.[2111]

Especially the coexistence of European and national state actors, who do not necessarily pursue similar aims, are relevant in that respect.

According to the discourse on multilevel governance, this creates interdependence between both state actors from different levels and state actors and non-state actors, who therefore need to take into account one another's initiatives. For the development of private law, this means that:

- In a multilevel legal order, multiple state actors become interdependent; they cannot independently guarantee the predictability, accessibility, consistency and responsiveness of private law, and the development of private law in accordance with these benchmarks becomes more complicated in a multilevel legal order. The interdependence entails higher standards for the process through which private law is developed, in particular for the interaction between actors. Simultaneously, the development of European private law has become more complictaed, making it more difficult for actors to meet these standards.

- The roles of actors are moreover subject to change.[2112] The increasing complexity of problems may prompt actors at the European and at the national level to delegate tasks to non-state actors with considerable expertise, such as the IASB.[2113]

- Because of these differences, successful national techniques – such as codifications and blanket clauses – cannot simply be transposed to the European level.[2114]

[2110] See further par. 2.6.2.1.
[2111] See further par. 2.6.3.1.
[2112] See par. 4.6.4.1. and par. 5.6.4.1.
[2113] See par. 4.4.1.1.
[2114] See par. 7.6.

- However, little attention has been paid to the question what actors should develop private law, and how private law should be developed, perhaps because legal scholars are more interested in the harmonisation of private laws or in substantive private law.[2115]

- Similarly, in discussions on the development of private law, actors developing private law do not take interdependence and the need for interaction as a starting point. Yet national legislators and courts cannot independently guarantee the stable development of private law; this also depends on the European legislator and the CJEU. This does not mean that actors have not interacted at all; however, interaction has not prompted actors to reconsider the use of national techniques.[2116]

What do these conclusions more generally mean for the roles of actors involved in the development of European private law and the use of techniques?

13.2. What actors should develop private law?

What actors are developing private law and what actors should develop private law? Currently, national state actors, and increasingly, European state actors play a role in the development of private law, as well as non-state actors. Yet what are the roles of these actors in the German and Dutch legal order, and at the European level, and why should these actors play a role?

13.2.1. A principled approach: the German framework

In the German legal order, a framework for assessing the role of especially private actors has been developed.[2117] This framework is based on principles of democracy, private autonomy ('*Selbstbestimmung*') and *Fremdbestimmung*. *Fremdbestimmung* arises if actors are bound without their consent, by rules that are also not based on the law.[2118] This framework can be sketched as follows:

- Originally, private law was developed through legislator or contracts. However, hybrids have developed: private actors increasingly have the possibility to participate in the development of rules that may have binding effect on third parties. These rules may become binding either because they have been sanctioned by state actors or because individuals agree to privately drafted rules, since they consider that they are not in the bargaining position to influence these rules, or because they do not assess these rules. As a result, parties become bound, not based on the law or their consent.

- This development coincides with the increased number of actors developing private law in the multilevel legal order, which in turn increases the chance that individuals may increasingly be confronted with rules not based on the law or their consent.[2119]

[2115] See par. 7.6.
[2116] See par. 7.6.
[2117] See further par. 4.2.
[2118] See further par. 4.2.2.
[2119] Notably, privately drafted rules are often also less accessible to private parties, which may increase the chance of "surprises".

- As such, the development of binding rules by private actors need not necessarily be problematic. In some cases, privately drafted rules reflect well-established practices, such as the development of collective labour agreements. Yet privately drafted rules are not necessarily drafted in the public interest. It is also possible that rules – such as STC's – have been drafted by private actors with particular interests, so that rules insufficiently take into account the legitimate interests of parties subsequently subjected to these rules.

- Notably, this situation can be mitigated in various ways. If processes where rules are drafted are sufficiently transparent, and open to participation of relevant actors, representative of stakeholder groups, this may prevent that rules are drafted solely in the interests of one group of actors. Rules may also be developed in collective negotiations processes, or processes may be supervised by state actors. Alternatively, privately drafted rules can be subject to judicial control.

- In other words, as privately drafted rules become more binding and therefore more like state rules, they are subjected to standards that are also imposed on state rules. These "control mechanisms" may overlap, yet they are also flexible, depending on the binding force of rules and their one-sidedness.

This framework cannot simply be transposed to other legal orders, as it is closely interrelated with the German constitution. However, the **private autonomy of individuals and *Fremdbestimmung* may be used as starting points to critically consider what actors should be involved in the development of private law**.

13.2.2. An instrumental approach: The European view

The German view can be contrasted especially with the European view. Not only is the European view less well-developed, it is also much more pragmatic.[2120] Rather than considering questions of private autonomy or *Fremdbestimmung*, the European approach is a pragmatic one. Therefore, **the role of actors in the development of European initiatives in the area of private law depends on the extent to which those actors can contribute to European policy aims**.

The European legislator may be particularly inclined to address non-state actors rather than state actors.[2121] As European actors seek to enhance the functioning of the internal market, it is logical to consult the parties faced with obstacles to the internal market, and non-state actors may have more interest in European, as well as foreign and international, initiatives than state actors, which may further motivate European actors to turn to non-state actors.[2122]

European actors have also recognised the need for representativeness and inclusiveness in the development of initiatives.[2123] Moreover, like German state actors, the European legislator has recognised the need for judicial control of STC's in consumer contracts,[2124] as well as the unequal bargaining position between businesses and consumers, which has prompted the European legislator to establish information duties and withdrawal periods – that have however not been uniformly introduced, but rather for specific contracts, or in

[2120] See par. 4.6.4. and 6.2.
[2121] See par. 6.4.1.
[2122] See par. 6.4.2.
[2123] See par. 4.4.2.3, and generally par. 4.6.3.
[2124] See par. 4.5.1.4.

specific situations, and also to improve the internal market. Notably, however, these control mechanisms have not been developed because STC's or other initatives are considered as alternative regulation the effects of which should be controlled.[2125]

Importantly, however, European actors cannot rely on a civil society in the way that national actors can. Nevertheless, the European legislator has actively sought to involve "civil society".[2126] Yet a closer look reveals that **frequently, European civil society is largely made up of carefully selected actors and "repeat players"**. Relevant actors at the national level are frequently not included, either in European consultations or in the development of European "self"-regulation. Also, reaching agreement between state actors and non-state actors and between non-state actors in the development of alternative regulation is notoriously difficult, which may discourage state actors from undermining the effect of alternative regulation by applying control mechanisms to alternative regulation.[2127] Therefore, **ensuring representativeness and inclusiveness at the European level is problematic**.

13.2.3. The middle road: the Dutch approach

The Dutch legal system provides a middle road between European law and the German framework.

Dutch actors have adopted a pragmatic approach to the development of alternative regulation.[2128] Accordingly, collectively negotiated STC's in consumer contracts, as well as collective labour agreements and corporate governance initiatives, as well as mass settlements have been developed.

Simultaneously, control mechanisms have been developed: collective negotiations take place between parties in equal bargaining positions, within a platform established by state actors,[2129] and the judiciary evaluates the representativeness of parties involved in alternative regulation.[2130] As enforcement is considered an important problem that may explain the lack of success in a particular area,[2131] this may also be considered as a solution for problems arising in areas where alternative regulation has been developed. More alternative regulation may also be an option.[2132]

Dutch actors have not considered the development of alternative regulation as an exercise of constitutional rights, with the exception of collective labour agreements. [2133] This consideration has however not withheld the Dutch legislator to adopt a pragmatic approach to the development of these agreements, which indicates that a principled approach need not necessarily exclude a pragmatic approach.[2134]

[2125] See par. 4.5.1.5 and 4.5.4.
[2126] See pars. 4.5.1.2., 4.5.3.4., 4.5.4., 5.5.3.7. For European consultations, see pars. 8.2.1.2., 10.3.2.4. and 11.3.3.4.
[2127] Particularly visible in the lenient evaluation of framework agreements, see par. 4.4.2.3.
[2128] See pars. 5.4.4. and 5.6.1.
[2129] Particularly CAO's, see par. 5.4.3.3. and collectively negotiated STC's, see par. 5.5.1.2.
[2130] Particularly mass settlements and CAO's, see par. 5.4.3.3.
[2131] Particularly corporate governance codes, see par. 5.4.2.1., as well as primary payment services, par. 5.5.3.5.
[2132] Particularly for mass settlements, see par. 5.4.3.3.
[2133] See par. 5.4.3.2.
[2134] See par. 5.4.3.1.

In the Dutch legal order, more experimentation has taken place, perhaps because of the more pragmatic approach towards the role of private actors, but perhaps also because the Dutch legislator adopts a more bottom-up approach than both German and European actors. Yet the German perspective and the principles on which that perspective is based are not unfamiliar within the Dutch legal order.[2135]

These different developments from German, European and Dutch actors make clear that **the view on the role of private actors and possible problems of *Fremdbestimmung* is essential for the development of control mechanisms**.[2136] The increasing development of alternative regulation, both at a national and a European level, indicates that the development of a new paradigm on the development of law is desirable not only for Dutch legal order,[2137] but also for the European multilevel legal order.[2138]

Arguably, the German perspective may offer useful insights on the roles of legal orders that may help Dutch actors to develop a more consistent and predictable approach towards the role of private actors.[2139] Specifically, the German approach may draw attention the possibility to consider the development of alternative regulation in the light of constitutional rights. Also, the German approach may prompt Dutch actors to consider the possibility that private actors need not necessarily pursue the public interest, which may be a reason to restrict their rather prominent role in some areas. As such, the assumption that private actors pursue private rather than the public interest is however too general. This, in turn, may also affect the development of control mechanisms.

Conversely, the Dutch approach may offer insights gained from more experimentation for actors from other legal orders and at other levels.[2140] Thus, the more lenient approach of Dutch actors may be beneficial for regulatory competition between forms of alternative regulation. Particularly, the insight that roles of private actors may not necessarily motivate more compliance, as became apparent in the drafting of the corporate governance code should be carefully considered. Yet even though some initiatives, in particular the development of Dutch law on collective redress, appear to be successful, constitutional considerations, in particular the right to access to a judge and *Fremdbestimmung*, may withhold German actors to adopt a similar approach.

The European approach may benefit from German and Dutch insights.[2141] The European approach has been criticised as instrumental, but this approach also follows from the attribution of competences to the European legislator. This does not mean that the instrumental approach cannot be criticised – European actors should be more aware there may be more reasons to develop law and alternative regulation than advancing European policy aims. As such, the European approach has not been sufficiently developed to inspire other actors, although European developments may put pressure on national actors to consider their approach to traditional legislation and the development of new governance at the European level.

[2135] See par. 6.4.1.
[2136] See par. 6.4.1.
[2137] See par. 5.6.4.3.
[2138] See par. 4.6.3.
[2139] See par. 5.6.4.3.
[2140] See pars. 6.2. and 6.4.2.
[2141] See pars. 4.6.3. and 6.2.

13.2.4. Consequences for the role of non-state actors

How does the instrumental approach of the European Commission affect the role of non-state actors at the national level?[2142]

- In some cases, overlooking relevant national initiatives decreases the relevance of European initiatives rather than national non-state actors' roles, as businesses and consumers already familiar with well-established self-regulation are not aware of European initiatives.
- In other cases, European law may decrease the role of well-established national actors, especially unions, while equivalent European initiatives such as framework agreements, are encouraged.
- This development is also visible in other fields, such as corporate governance, social corporate responsibility and accounting standards, where the European Union encourages the development of further alternative regulation from the perspective of European policy aims, without considering the need for restraint because of potential *Fremdbestimmung*, and overshadowing national initiatives where control mechanisms are better developed and applied.
- Control mechanisms at the European level are exercised with restraint, which, from the perspective of *Fremdbestimmung* and private autonomy, is especially problematic if alternative regulation leads to the development of rules also binding on third parties that may subsequently not been subjected to control mechanisms at the European level.
- The impression arises that the European legislator is not opposed to alternative regulation as such,[2143] but finds that potential divergences may give rise to barriers to the internal market. Therefore, the European legislator prefers European alternative regulation to national alternative regulation, even without well-established control mechanisms, and notwithstanding the success of some well-established national initiatives.

13.2.5. A coherent approach?

The principles underlying the German framework offer a useful starting point for a more critical approach towards the role of actors which may be useful considering the lack of attention for the question by whom private law ought to be developed. Yet the principles underlying the German framework do not lead to a coherent European framework to determine the role of actors for various reasons: [2144]

- Even if views on the role of actors are based on principles of private autonomy, the views of when parties' autonomy is actually at stake, or which "mechanisms" are best suited to remedy potential breaches, may differ.[2145]

[2142] See on these questions pars. 4.4.3., 4.5.4. and 5,5.5.
[2143] This becomes visible in the encouragement of Dutch initiatives in consumer credit or package travel, see par. 9.3.1. Notably, simultaneously, overlapping self-regulation may inhibit accessibility, see further par. 5.4.1.1.
[2144] See par. 4.6.3.
[2145] See pars. 4.5.1.1. and 5.5.1.1.

- The question should not be “What actor should develop private law?”, but rather “What actors should be involved in the development of private law?” The answer to this question in turn depends on the question what actors have the most expertise and develop private law in the best manner.[2146]

- Even once that question is answered, the answer may still change over time, as actors’ role are subject to change.[2147] For example, as actors organise themselves better and are more willing to make transparent how they develop self-regulation, alternative regulation may be indicated, whereas previously, this possibility had been rejected. More European integration might justify a more prominent role of European non-state actors. Simultaneously, if alternative regulation turns out to be problematic, the legislator may intervene.

- The comparison between the Dutch, German and European approach has revealed differences with regard to the role of actors in the development of private law that have not affected the use of techniques, indicating that differences in the relation between the legislature and judiciary need not necessarily lead to a radically different use of techniques.[2148]

13.3. The use of national techniques

Because of the interdependence between actors in the multilevel legal order, actors involved in the development of private law should take into account the relevant initiatives of other actors.[2149]

- If this is the case, actors may profit from one another’s insights, which will be beneficial for the predictability, consistency, accessibility and responsiveness of private law.

- If this is not the case, the chance that actors’ will undermine the initiatives of other actors increases, and problems will arise, which will detrimentally affect the predictability, consistency, accessibility and responsiveness of private law.

The development of private law in the German and Dutch legal order characteristically takes place through codifications, blanket clauses, and general principles. Soft laws, at the European level, have also been developed and show remarkable similarities with these national techniques, even though they consist of black letter rules and are not a “living system”, further developed in case law, and used in everyday transactions.

13.3.1. Problems because of restraint at the national level

- In the development of private law, actors have not made it a habit to take into account the initiatives of other actors.[2150] This is visible at both the national and the European level. At the national level:

[2146] See par. 6.5.
[2147] See pars. 4.6.5. and 5.6.4.
[2148] See par. 6.3.1.
[2149] Seepar. 7.1.
[2150] See par. 7.6.

- The implementation of the *acquis* in the German and Dutch codes should be seen against the background of efforts of national legislators to maintain the accessible and consistent development of national law.[2151] Therefore, the amendments to national laws are frequently kept to a minimum in the German and Dutch legal order, which also makes the European background of harmonised rules less clear for private parties and practitioners.

- In the implementation and interpretation of blanket clauses, German and Dutch state actors have similarly adopted restraint – in both legal orders, judges have emphasised the competence of the national judiciary in the evaluation of cases in accordance with harmonised blanket clauses.[2152]

- The Dutch case study has however shown that whereas this approach may be successful if national actors may rely on successful national law that resembles a new measure, it may lead to problems if this is not the case.[2153]

- Both German and Dutch courts follow the legislator's restraint.[2154] A reason for this restraint may be the efficient and just settlement of disputes, which may be overlooked in European debate, where actors directly concerned with settling disputes do not sufficiently participate.[2155] Generally, this restraint is exercised by both higher and lower courts. However, both the Dutch and German case study indicate that the role of highest courts, and restraint exercised by these courts, may be undermined if their decisions are not easily reconcilable with CJEU decisions and lower courts refer to these decisions or the CJEU.[2156]

- Harmonisation initiatives have not prompted German and Dutch actors to reform national law, even if national law, especially Dutch law, shows deficiencies.[2157]

This restraint may also have been exercised because the BGB[2158] and the BW[2159] have been reformed relatively recently – if the law is generally regarded as problematic, national state actors might be more open to suggestions for reform.

- Conversely, European initiatives, especially in an early stage, have not withheld national legislators from reforming the law.[2160] Waiting for these initiatives is problematic, as it is not certain that initiatives will lead to harmonisation, and even if this is the case, it may be a considerable time before harmonisation has been established. Yet once national law has been established, national actors will be less willing to amend the law again, in accordance with newly established Directives.

Because of the restraint of national actors, problems may arise:

[2151] See par. 7.2.1.
[2152] HR 21 September 2012, *RvdW* 2012, 1132, BGH 14 July 2004, *BeckRS* 2004, 7903.
[2153] See pars. 11.3.3.2. and 11.3.3.3.
[2154] See pars. 10.3.2.3. and 11.3.3.3.
[2155] See par. 8.2.1.2., confirmed by the case studies, see pars. 10.3.2.4. and 11.3.3.4.
[2156] See pars. 10.4.1.2. , 11.4.1.2. and 11.4.2.2.
[2157] See par. 11.3.3.4.
[2158] See par. 10.3.2.4. Notably, the reform did not entail amendment of the law on STC's, see par. 10.3.1.3.
[2159] See par. 11.3.3.1. and 11.3.3.2.
[2160] See pars. 7.2.2., 10.3.1.1., 10.3.1.2. and 11.3.1.

- Even if no visible problems arise because of restraint, as is the case in the German case study, the restraint of national actors prevents that problems and relevant questions on the implementation of Directives become visible at the European level. Consequently, reform of these measures will overlook relevant measures, which may lead to a circle: because of a lack of responsiveness, national actors will continue to exercise restraint, and relevant questions will therefore not be addressed at the European level, etc.[2161]
- The implementation of the private law *acquis* takes place on an *ad hoc* basis towards the implementation of the *acquis* that is not predictable and differs throughout the Union.[2162]
- The restraint of the courts makes it less likely that incorrect implementation is compensated by the judiciary.[2163]
- The implementation of the *acquis* within codes is not sufficiently accessible to legal practice.[2164]
- In the Dutch legal order, inconsistencies have arisen because lower courts do not sufficiently take into account decisions of other lower courts and the Hoge Raad, as well as the CJEU. One lower court[2165] has referred to the CJEU despite previous case law from the Hoge Raad, which indicates the need for a more active approach of the Hoge Raad.
- The restraint of the Dutch judiciary may also have lessened the extent to which blanket clauses can reduce the need for legal reform, in the interest of the stable development of the law, as visible in the German legal order.[2166]
- In the Dutch legal order, problems have also arisen with regard to the correct application and interpretation of overlapping international law and the *acquis*.[2167]
- The lack of predictability and consistency in Dutch courts may undermine the legislator's attempts at regulatory competition,[2168] whereas the approach of German courts may help the attractiveness of German law in international trade, which is however less visible than legislation.[2169]
- The BGH[2170] has decided on overlapping international law and the *acquis*, which has inhibited the chance of the CJEU to decide these cases, in accordance with its competence. Thus, there is less clarity on the relation between different Directives as well as the *acquis* and international sources, and the chance of inconsistent decisions on similar overlaps increases.

However, the approach of national actors has managed to preserve the consistency and accessibility of private law within codifications, and has allowed the judiciary to develop the law responsively; European actors are not well-placed to develop private law responsively.

[2161] See pars. 10.6.1. and 11.6.1.
[2162] See pars. 7.2.1., 7.2.3., 10.3.1.4.
[2163] See pars. 10.3.2.3. and 11.3.3.3.
[2164] See par. 7.2.1.
[2165] Hof Amsterdam 8 March 2011, *NJF* 2011, 242 (Case C-488/11).
[2166] See par. 10.2.
[2167] See further par. 11.3.4.2.
[2168] See par. 11.3.3.7.
[2169] See par. 10.3.3.3.
[2170] Comp. BGH 28 March 1996, *NJW* 1996, 1819, which is however in accordance with CJEU 14 December 1976 (Colzani/Rüwa), Case 24-76, [1976] ECR, p. 1831. Also, BGH 31 October 2001, *NJW* 2002, 370, which has however been followed by Dutch courts, see par. 11.3.4.2.2. The decisions in BGH 1 February 2005, *NJW* 2005, 1774 and BGH 5 December 2006, *NJW* 2007, 997, consistent with BGH 20 January 1983, *NJW* 1983, 1322, are also problematic.

13.3.2. Problems because of a lack of interaction at the European level

In the light of the restraint exercised towards European initiatives, it is not illogical or surprising that European actors try to involve non-state actors at the European level and take positions in the debate that are contrary to national views. In particular, the restraint at the national level makes it highly unlikely that national actors will signal problems for the internal market and suggest harmonisation. **European actors should also take relevant initiatives from actors into account, which is not always the case**:

- In the development of the *acquis* itself, debate has not been encouraged. The pragmatic approach detected earlier at the European level is also visible in the development of the *acquis*. Rather than considering debate as something that can contribute to the quality of the *acquis*, the debate is organised and limited to the choices preselected by European actors, as becomes especially visible from the shortcomings in the use of consultations[2171] and impact assessments.[2172]
- A preference for a hierarchical approach is visible, combined with the preference to use techniques that have also been successful at the national level.[2173] This preference is in line with the pragmatic approach – non-hierarchical techniques typically depend on the initiatives of private parties. Thus, although actors at the European level are quite willing to benefit from the expertise and experience of non-state actors, the development of the law through bottom-up approaches is typically not left to these actors.[2174]
- However, that does not mean that the success and the quality of hierarchical approaches does not also depend on the initiatives of non-state actors,[2175] or that hierarchical initiatives are necessarily successful,[2176] which is regrettably often overlooked.
- Some developments can be seen especially in the light of the pragmatic approach: the use of guidelines in the development of Directive 2005/29 and the suggestions for the use of comitology. Both approaches allow the Commission an important role in developing the law outside of the legislative process, without apparent control mechanisms, while rules developed in these processes may not be subjected to subsequent national control mechanisms and initiatives may overshadow well-established national initiatives. Therefore, these initiatives should be carefully avoided.
- The hierarchical approach is also visible in initiatives from non-state actors, especially in the development of soft laws.[2177] Although these initiatives are not binding, they are based on the model provided by national legislation, which has also been assumed to lead to their success – and like national legislation, soft laws do not indicate their relation to other soft laws or their role in the reform of the *acquis*, which may undermine consistency, accessibility and a more predictable reform of the *acquis*.

Because of the restraint of European actors, inconsistency, unpredictability, inaccessibility and a lack of responsiveness has developed:

[2171] See further par. 8.2.1.2.
[2172] See further par. 8.2.2.1.
[2173] See par. 8.7. For example, the preference for the use of blanket clauses can be seen in this light, see par. 7.4.1.
[2174] See pars. 4.5.1.2.1., 4.5.2.4., 5.5.2.5.
[2175] See par. 8.7.
[2176] See par. 11.7.2.3.
[2177] See par. 7.3.1.

- The lack of debate has entailed that the needs of national actors are overlooked, as well as their views on justice.[2178]
- The lack of debate has undermined the understanding of the *acquis*, and as actors do not understand why the *acquis* develops, this makes future developments also less insightful and therefore less predictable.[2179]
- The lack of reference to relevant Directives and soft law has led to inconsistencies.[2180]

Shortcomings at the national and European level should not be considered separately from one another. Shortcomings at both levels decrease the chance that shortcomings in the democratic process at one level are compensated at another level. Instead, shortcomings may reinforce one another.

13.3.3. Benefits arising from interaction in the multilevel legal order

In some cases, actors have clearly recognised the benefits of other actors' insights, both at the national and European level, which has benefitted the law.

- National legislators have generally recognised the use of comparative law in the drafting of codifications.[2181] Interesting new initiatives such as the Dutch prejudicial procedure have also carefully taken into account insights from comparative law as well as relevant European initiatives.[2182]

- National legislators have recognised the benefits of regulatory competition, which has also been encouraged at the European level, for example in the area of company law.[2183]

- Regulatory competition may also take place between non-state actors involved in the development of alternative regulation.[2184] Especially if innovative initiatives are visible – in the Dutch legal order, the development of corporate governance, mass settlements, the new prejudicial procedure and collectively negotiated STC's, in the German legal order, corporate governance and social corporate responsibility – actors in other legal orders may benefit from these insights and experiences.

- However, initiatives that are successful in some legal orders, such as the VOB in Germany, may not be successful in other legal orders, as visible in 'dead letter' article 6:214 BW and the rejection of comitology procedures in Germany. That does however not mean that actors cannot make use of comparative insights.

- European actors have also recognised that actors at the national level with well-established regimes may provide valuable feedback for harmonisation initiatives, for example in the area of unfair terms.[2185]

[2178] The lack of referral to national practice in the DCFR can be seen in this light; see pars. 10.7.2.2. and 11.7.2.2.
[2179] See par. 8.2.2.3.
[2180] See par. 11.6.1.
[2181] See pars. 10.3.1.2. and 11.3.1.
[2182] See par. 11.7.3.3.
[2183] See par.s 8.5.2., 10.3.3.1.4. and 11.3.4.1.
[2184] See par. 6.4.2.
[2185] Accordingly, the European legislator took into account German feedback of the 1990 draft for a Directive on unfair terms in consumer contracts, see further par. 10.3.2.1.

- The interest of European actors in national initiatives may prompt national actors to anticipate harmonisation initiatives or the implementation of Directives that are not politically controversial.[2186]

- Notably, however, even if actors involved in the drafting of legislation have extensively taken into account comparative law, the needs and preferences of legal practice and relevant European developments, this does not mean that problems will not arise. The legislator may, for political reasons, choose to not to amend the law.[2187]

More interaction may contribute to the stable, accessible, consistent and responsive development of the law:

- More debate may make actors better aware of new initiatives[2188]
- Taking into account experiences in legal orders with a well-established system decreases the chance that legislators develop rules that are unpredictable or difficult to apply in practice, or that are easily circumvented, while successful rules that respond to the needs of legal practice may be taken as examples[2189]
- More interaction increases the chance that national actors take into account relevant initiatives from other actors, which decreases the chance of inconsistencies.[2190]
- More interaction in the implementation of Directives may prompt national actors to consider national law more critically, and if necessary, reform outdated or unsatisfactory national law.[2191]
- More interaction may make national actors more aware of potential inconsistencies in the *acquis* as they develop.[2192]
- More interaction might make European actors more aware of national experiences and problems in the *acquis*, enabling European actors to improve Directives and prevent future inaccessibility, inconsistency and unpredictability.[2193] Accordingly, if actors involved in the drafting of the DCFR take into account national experiences in the implementation of Directives, this could significantly contribute to the responsiveness of reformed Directives and contribute to the consistent development of the law.[2194]
- More communication, either from more clarity at the European level or from more lobbying at the national level, may make clearer why the European Union seeks to initiate harmonisation in a particular area, which may make these initiatives less unpredictable.[2195]
- More interaction between courts at the national and the European level would lead to more clarity on the allocation of competences between national and European courts in the interpretation of blanket clauses.[2196]

[2186] See further par. 7.2.2.
[2187] See par. 8.2.5.
[2188] See par. 8.2.1.3.
[2189] See par. 8.2.1.4.
[2190] See par. 8.2.1.3.
[2191] For example by following the WODC report on the attempted reform of Directive 93/13, which however did not happen, see par.11.3.3.4.
[2192] See par. 11.6.1.
[2193] See par. 8.2.1.4.
[2194] See pars. 10.7.2. and 11.7.2.
[2195] See par. 8.2.1.4.
[2196] See pars. 7.4.2., 10.4.1., 11.4.1.3.

- More interaction between Dutch courts would contribute to more consistent and therefore more predictable decisions.[2197]

The interdependence between actors also entails that beneficial and detrimental developments may reinforce one another but also undermine one another. Thus, European initiatives for regulatory competition may be undermined if lengthy national legislative procedures overlook relevant initiatives from other actors, which renders the proposals at the national level ineffective,[2198] and more involvement of national actors in the European legislative process may not lead to more debate if there is insufficient opportunity for debate and the responses of national actors are not taken into account in the discussion of European initiatives.

13.3.4. Improvements in the development of the law

This thesis has suggested more and better interaction, in accordance with **the suggestion for deliberation**. Although starting points for debate are visible and improvements have been initiated,[2199] deliberation requires a further step: a different approach of actors that should not focus on their own interests, as is currently the case, but rather on the question how private law can be improved in terms of predictability, consistency, accessibility, and responsiveness. Considering the debate on the reform of the *acquis* and the approach of actors in this debate, **it may be doubted whether deliberation is likely to develop**. [2200]

Various points of improvement are possible at the national level:[2201]

- Actors should adopt a more active approach to European initiatives, which entails:
- National actors should generally pay more attention for possible inconsistencies that may arise in the *acquis*
- National legislators should consider national law more critically in the light of European proposals, rather than assuming that national law is already in accordance with the Directive – initiatives for harmonisation should also be considered as an opportunity to consider whether reform is necessary.
- National legislators should also increasingly involve foreign and European actors – in particular Members of the European Parliament – in the reform of the law and especially in the implementation of Directives
- National legislators should adopt a more consistent and predictable approach to the implementation of future initiatives. Notably, an optimal approach also depends on national developments, and therefore, the use of Directives – including Directives that pursue maximum harmonisation – will generally result in fragmented approaches to harmonisation. Nevertheless, taking into account the approach of foreign legislators to the implementation of Directive may still be beneficial.
- A more active approach of highest courts towards referring questions to the CJEU. Highest courts should also exercise less restraint in referring to the CJEU, but also to foreign courts and international materials. In the Dutch legal order, judges need to

[2197] See pars. 11.3.4.2.1., 11.3.4.2.2., 11.4.1.4., 11.4.2.2.
[2198] For example, the postponed Dutch reform of company law can be seen in this light. See further par. 8.2.
[2199] See further par. 8.2.
[2200] See pars. 10.6.3. and 11.6.3.
[2201] See pars. 8.2.1.3., 10.6.3., 11.6.3.

take more note of one another's decisions as well as decisions form the CJEU and the Hoge Raad.

- National actors should encourage involvement at the European level, possibly by issuing separate consultations, as currently visible in the English legal order, or alert national actors to consultations in prominent national networks and legal journals.
- Decisions in ADR procedures should be consistently published in the interest of the predictability of decisions in these procedures for private parties and the consistency of these decisions with European and national consumer contract law.[2202]
- Judges should take into account relevant self-regulation in the interpretation of blanket clauses if actors have committed themselves to these codes.[2203]
- Actors should reconsider their defensive approach, which has so far not discouraged European actors, and instead explain carefully if and why European initiatives will not contribute to

At the European level:

- Actors should make more use of improved consultations and impact assessments. [2204]
- European actors should pay more attention to the need to preserve the predictability, accessibility, consistency, and responsiveness of private law from the perspective of national actors, to remedy the odd difference in emphasis especially visible between German and European actors.[2205] This also means that the European legislator should exercise restraint and not pursue harmonisation for the sake of harmonisation.
- The European legislator should take responses to consultations into account and indicate more clearly how responses are taken into account.[2206]
- Non-state actors – especially involved in the drafting of soft law – should take into account the *acquis*, overlapping sets of soft law, and national experiences in the implementation of the *acquis*, if it is to serve as a "toolbox" for European and national state actors.[2207]
- The CJEU, as well as national courts, should make more explicit when it recognises general principles and what principles effect general principles may have. More generally, general principles should serve as a starting point for interaction between courts.[2208]
- European actors should rely more on well-established national networks and databases rather than establishing multiple overlapping European databases. [2209]

These improvements should not be seen in isolation from one another. Rather, improvements and shortcomings at one level may compensate or reinforce shortcomings from actors at other levels.[2210]

[2202] See par. 11.7.3.
[2203] Particularly, in the Dutch legal order, this may enhance the effectiveness of the GBL, as well as the code of conduct on energy contracts. See further par. 5.5.3.6.
[2204] See pars. 8.2.1.3. and 8.2.2.3.
[2205] See par. 10.6.1.
[2206] See par. 8.2.1.3.
[2207] See par. 10.7.2. and 11.7.2.
[2208] See par. 7.5.1.
[2209] See pars. 8.2.3.3. and 8.2.4.3.
[2210] See par. 8.7.

Eventually, as debate improves, this may move actors to adopt less defensive approaches to initiatives for harmonisation, and resistance against harmonisation may not be considered as mere resistance from actors that prefer the status quo, but may be considered in more detail.

13.3.5. A guide to the development of private law in the multilevel legal order?

Although some general recommendations can be made for the development of private law in the multilevel legal order, the optimal ways to develop private law depend on the area of law, the level of integration, the existence or development of alternative regulation, as well as the existence or development of new practices.[2211] The case studies moreover suggest that the optimal combination of techniques may also depend on the existence of well-established national regimes and may differ between Member States.[2212]

General recommendations are based on the interdependence of actors involved in the development of private law.

The development of private law in a multilevel legal order has become considerably more complicated. Actors should make use of the insight from relevant actors and should sufficiently take into account relevant initiatives from other actors.

Actors should more critically consider the use of techniques in the multilevel legal order, not only paying more attention to possible bottom-up techniques, but also to the combination of techniques.[2213] Notably, techniques – for example codifications – are not used in isolation from other techniques, but alongside blanket clauses, based on general principles, studied in commentaries, developed in case law collected in databases, and further discussed in legal journals and networks. The use of top-down techniques is often combined with bottom-up techniques, but the success of bottom-up techniques typically depends on the initiatives of private parties and non-state actors.[2214]

Therefore, when considering the development of law on a specific issue, actors should not ask for the way in which the law can best be developed, but the ways in which the law can best be developed.

The question how private law should be developed is not a question that, once answered, can further be ignored. Especially codifications and blanket clauses could benefit if actors involved in the development of codes and blanket clauses consider the consequences of the multilevel legal order for these techniques.[2215]

Currently, the brunt of private law is developed at a national level, and state actors play a central role. Although the legislative process may result in successes, severe shortcomings are visible in the legislative processes at the European and national level,[2216] while it may be doubted whether deliberation will be developed. Nevertheless, starting points for

[2211] See pars. 9.1, 9.2, 12.2.
[2212] See par. 12.2.
[2213] See par. 7.6.
[2214] See further par. 8.7.
[2215] Especially in German legal order, the distinction between *Sonderprivatrecht* and general private law, and the reasons to keep *Sonderprivatrecht* out of codes, might have prompted these considerations. See further par. 10.3.1.
[2216] See par. 8.2.

improvement of the legislative process, especially at the European level, have been developed.

It is essential that the legislative process is improved. If legislative processes continue to show severe shortcomings, the question arises what advantages these processes have over other processes, – in particular the development of private law through case law or soft law, as well as alternative regulation – severe and consistent shortcomings in legislative processes may make it more likely that formally democratic rules *de facto* lead to *Fremdbestimmung*.[2217]

Logically, shortcomings from legislators will have to be remedied by other actors, either non-state actors, or the judiciary. If problems persist, non-state actors may make a more convincing case that they are better placed to develop the law. Alternatively, these actors may play an increasingly prominent in the democratic process. The German legal order rightly questions an overly prominent role of non-state actors in the legislative process, especially as questions arise how this involvements affects the interests pursued by legislation.

It may be doubted whether the European legislator will find the increasing use of these alternatives to the democratic procedure problematic, especially in the light of its previous support and use of the DCFR and its suggestions for comitology that are in line with its pragmatic approach.

However, the choice for alternatives is currently not convincing, because the current choices and suggestions for the use of the DCFR[2218] and comitology[2219] show severe shortcomings that may undermine the predictable, consistent, accessible, and responsive development of private law.

The principles underlying the German normative framework, private autonomy and *Fremdbestimmung*, may indicate in which cases the development of private law should not lead to binding rules without sufficient control mechanisms. These control mechanisms should also be developed if private law is eventually to be developed increasingly through alternative regulation both at the European and national level. In turn, this may affect actors' roles.

13.4. Problematic or beneficial coexistence?

The extent to which the coexistence of actors is problematic or beneficial depends on the area of private law and the involvement of and interdependence between actors in that area. The ongoing development of the private law *acquis*, as well as the development of alternative regulation, has resulted in the development of increasingly specialised areas of law that differ from "traditional" areas of private law, which in turn obliges national actors to accommodate these developments in national law.

[2217] See further par. 8.7.
[2218] See par. 7.3.1.
[2219] See par. 8.3.2.

If multiple actors are involved in the development of private law, the extent to which this is problematic or beneficial for the quality of private law depends on the extent to which these actors interact with one another, and take relevant initiatives of other actors into account.

To what extent is this conclusion in accordance with the debate on multilevel governance?

Firstly, **multilevel governance has emphasised the changing role of actors in the European multilevel legal order**. An important change in comparison with traditional nation states is the increasing interdependence between actors. This is already visible at the national level; the case studies have made clear that both the approach of legislators and courts is important for the attractiveness of a particular set of rules. The active approach or their restraint may respectively compensate for the rejection of regulatory competition or undermine attempts to make national law attractive to international parties.

Because of increasing interdependence, national legislators, though trying to maintain the predictability, accessibility, consistency and responsiveness of private law, increasingly have to cope with European initiatives and cannot independently maintain the predictability, consistency and accessibility of private law. Simultaneously, the capability of highest national courts to maintain a course diverging from CJEU case law is undermined by lower national courts. Consequently, national actors need to more critically consider the development of the *acquis* and ensure that inconsistencies do not develop at the European level. This is made more difficult by the functional approach of European and non-state actors towards the development of private law. Also, the aim of the European legislator to advance the internal market entails that the development of the *acquis* will also depend on developments in the internal market, and will therefore, inherently, remain difficult to predict. Consequently, codifications at the national level are less able to act as a restraint for legislators, to safeguard the stable development of private law. The Dutch case study has moreover made clearthat the restraint of courts in the implementation and interpretation of blanket clauses may aggravate the need for legislative intervention and reform. Conversely, European actors depend on national actors and private actors for the correct implementation of Directives and for referral to the CJEU, which has however proven problematic.

Frequently, in the debate on private law, when considering shortcomings in the development of private law, one hears that developments of other actors, at other levels, show similar, or worse, shortcomings. Accordingly, shortcomings are visible in the legislative process of actors at the national, European and international level, and shortcomings can also be found in the development of alternative regulation. Successes are also visible. However, this conclusion does not justify – although it may explain – mistakes from actors. Rather, **shortcomings from one actor or several actors may undermine the initiatives from other actors**. Consequently, shortcomings at one level should prompt actors, either at the same level or at different levels, to develop compensatory measures or to prompt other actors to reconsider their initiatives,

Over time, if the *acquis* continues to develop, and private actors are increasingly involved in the development of legislation and alternative regulation, the role of actors may be subject to more change. The role of national legislators in developing private law may already be limited because of the development of the *acquis*, but as the *acquis* develops

further, more emphasis on the need to implement the *acquis* and maintain an accessible and consistent private law will develop. Moreover, as developments become more difficult to oversee and predict, the legislator may be increasingly inclined to include blanket clauses, which may in turn increase the role of the judiciary. At the European level, more blanket clauses and ambiguous terms may also develop by way of political compromise. In the Dutch legal order, this development would be in line with the emphasis on the role of the Hoge Raad in the development of the law. In turn, if well-established self-regulation is increasingly included in the interpretation of blanket clauses, and if the development of more European initiatives prompts more national judges to refer questions to the CJEU, the discretion of national judges would simultaneously be limited. The increasing development of alternative regulation may also prompt national legislators to consider a more consistent and predictable approach to alternative regulation, which may in turn affect the role of non-state actors.

Simultaneously, the changing role of actors is subject to constitutional constraints, in particular in the German legal order. In particular, reallocating competence to the European level will be subject to constraints imposed by article 79 par. 3 GG. Constitutional constraints are also visible with regard to the role of private actors in the legislative process and if the development of alternative regulation leads to *Fremdbestimmung*, the question arises whether the judiciary is constitutionally bound to impose restraints on this development. Similar restraints are not visible in the Dutch legal order, but the question arises whether a more critical perspective on the development of alternative regulation at the European development should not be considered more critically.

Secondly, **the changing role of actors also entails that competences are distributed differently over the European and the national level, and non-state actors**. The legislative and interpretative competences of national actors are reallocated to the European level as the *acquis* continues to develop.

In the Dutch and German legal order, the role of non-state actors may also decrease as European initiatives on alternative regulation develop and replace national initiatives, as is the case for national unions. The extent to which further European initiatives will replace national initiatives depends on the binding force of these alternatives. Notably, collective negotiations at the European level have resulted in binding rules before. This might be problematic as these initiatives overlook relevant initiatives and therefore likely overlook relevant insights and the needs of these actors. Therefore, these developments may ultimately lead to *Fremdbestimmung* and undermine the responsiveness of the law. Alternatively, the development of alternative regulation may serve as a prelude to harmonisation, especially if those initiatives are not sufficiently successful. The chance that these initiatives are successful however decreases if successful national initiatives are overlooked. If these European initiatives do not become binding, it can be doubted whether they will be successful as actors at the national level may simply not be aware of these initiatives, and if so, they have insufficient reason to abandon well-established self-regulation.